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REPORTS.

CASES DECIDED

From 12th OCTOBER, 1892, to 3rd NOVEMBER, 1893.

EDITED BY P. B. MACGREGOR, BARRISTER-AT-LAW, AND M. J. O'SULLIVAN (ASSOCIATE TO MR. JUSTICE REAL).

THE CASES REPORTED BY GEORGE SCOTT, BARRISTER-AT-LAW.

VOL. V.

BRISBANE:
WATSON, FERGUSON & CO., QUEEN STREET.

1894.

ERRATA.

Page 1, line 6, for "31 Vic. No. 9," read "31 Vic. No. 19."

Page 1, line 10, for "will," read "petition."

Page 2, line 3 from bottom, for "p. 42," read "p. 142."

Page 2, line 6 from bottom (right-hand column), strike out word "*Lilley*."

Page 21, line 3 (right-hand column), for "54 Vic. No. 33," read "55 Vic. No. 33."

Page 95, line 23 (right-hand column), for "37 Vic. No. 5," read "38 Vic. No. 5."

TABLE OF THE CASES REPORTED.

THE QUEENSLAND LAW JOURNAL REPORTS.

Edited by P. B. MACGREGOR and M. J. O'SULLIVAN.

VOL. V.

OCTOBER SITTINGS OF THE FULL COURT.

Re THE WILL OF WALTER ADAMS, DECEASED.

Will—Petition for advice—Reference to Full Court—Signature of counsel—Trustees and Incapacitated Persons Act of 1867 (31 Vic., No. 9), ss. 6 & 7—The Judicature Act (40 Vic., No. 6), s. 7.

A petition for advice presented by the trustees under a will to The Chief Justice in Chambers, was referred by him to the Full Court. The will was not signed by counsel, but the signature of the petitioner was witnessed by counsel.

Held (HARDING, J., dissentiente), that the Full Court had jurisdiction to hear the petition.

Per HARDING, J.: That, as there was no appeal from the opinion of the judge of first instance, the Full Court had no original jurisdiction, and would not hear the application.

Per Curiam: The petition must be signed by counsel. *Re Boulton's Trusts*, 30 W.R., 596, followed.

PETITION for advice by the trustee of the will of Walter Adams referred to the Full Court by LILLEY, C.J.

Lilley, for trustee.

HARDING, J.: Has this Court jurisdiction to hear the matter? By sec. 6 of *The Trustees and Incapacitated Persons Act of 1867*, a trustee may apply to a judge in Equity by petition, or by summons to such judge in Chambers.

An adjournment was then granted to consider the objection, and at the October Full Court the petition came on for hearing.

Lilley: The petition is in the same form. It is not a special case. There are no authorities on the question. The same practice was followed in *In re the will of James Scott.* Sec. 7 of *The Judicature Act* gives power to any judge to reserve any point for the consideration of the Full Court.

REAL, J.: This matter first came before The Chief Justice and myself, who at the time constituted the Court—the late Mr. Justice Mein being away. In my opinion the true construction of the section of *The Judicature Act* enables a judge to obtain the assistance of the Full Court in matters in which he himself has some doubt, and where he thinks it would be less expensive to the parties to proceed at once by reference to the Full Court, or to allow them to start the suit *de novo*. The object of the section of *The Trustees and Incapacitated Persons Act* is to provide that a trustee may apply to a judge in Equity for his advice and direction. Previous to that the only method of obtaining protection was by some declaration. The case of *Bowland* v. *Morgan*, 13 Jur., 23, is the case in which that proceeding was adopted, and it was decided that the trustee, although entitled to his costs of instituting a suit and obtaining a declaration, was not entitled to his costs of appeal, because by the institution of the suit and the declaration of the Court he was protected and had no further interest in the matter. Under the section of *The Trustees Act*, the trustee having applied to the judge in Equity for his opinion and advice, and obtained that, is indemnified. *The Judicature Act* then provides that, in any case heard before a judge in

Chambers, he can, if he think proper, refer it to the Full Court. The question is whether that provision, which appears to me to have been enacted by the Legislature for the purpose of preventing the multiplication of costs, can be applied to *The Trustees Act*, which appears to have been passed for the express purpose of enabling trustees to administer estates with the probability that they would be doing right, or at all events, would be protected. It seems to me that the spirit of the Act enables the judge to refer to the Full Court. I am sorry that I shall have to differ from my brother Harding, who I know is so familiar with the practice, but looking at the sections I can come to no other conclusion. I am forced to come to this conclusion on examination of the previous practice, and looking at the sections and the object of the sections. The judges of the Court have decided that matters even of construction may be dealt with. It appears that in England the narrowest possible construction has been put upon the section. If the Court had decided that it was only in trivial or minor matters they would interfere, not on questions of construction, then I can hardly conceive a case in which a judge of himself would feel it necessary to get the assistance of his brother judges. The only thing we have to do is to look round and see if either the practice of the Court or special Act of Parliament has enabled us to give assistance. It appears to me that *The Judicature Act* enables us to give that assistance; it appears to me that the judge, from whom this matter was brought, had power to refer it to this Court for their opinion.

LILLEY, C.J.: I agree with my brother Real, and with the reasons that he has given for his decision.

HARDING, J., after referring to the sections of the Acts, quoted, and to the decision of Lilley, C.J., in *In re the will of Tooth*, 1 Q.L.R., pt. ii., 10, and to the decision of Vice-Chancellor Wood in *The Jurist* of 1860, p. 42, said: I would have been inclined, without looking further into the matter, to hold that where the Court has no jurisdiction it cannot gain jurisdiction by the act of a judge from whom an appeal would lie if the matter were appealable. I think that was the intention of the present scheme of legislation, and my view is borne out by section 4 of *The Supreme Court Act of 1892*, which says that after the passing of that Act no judge shall sit on an appeal in a case which he has determined. That, to my mind, enacts that the law now requires the judge of first instance to decide everything that comes before him in the first instance. It will also save expense. I do not think this power of reference exists, and I am sorry to differ from my brother judges, but will in future follow their decision.

LILLEY, C.J.: I have always felt rather rebellious towards the English decisions. They have followed too closely the decision given immediately after the passing of the Act by Vice-Chancellor Wood, narrowing down, unnecessarily I think, the beneficial enactment of the English Legislature which gave a judge power to give advice or direction to parties who might bring any matter before him. With regard to my brother Harding's construction of the late Act, I think that that Act made no alteration in the substantial law, except in this way—that a judge who has heard or determined a matter cannot sit on the appeal. That appears to be the length and breadth of the matter. I adhere to my opinion and to my action in sending this matter to the Court, and all that is determined is that I was right in doing so.

Lilley, C.J.: The petition has not been signed by counsel in the ordinary way, and it has been decided in *Boulton's Trusts* (30 W.R., p. 596), that it must be signed by counsel. It has been witnessed by Mr. F. W. Payne, but not signed.

Solicitors for trustee: *Bernays & Osborne.*

DECEMBER SITTINGS OF THE FULL COURT.

MARTIN *v.* THE MUNICIPALITY OF BRISBANE.

New trial—Negligence—Corporation—Knowledge.

The defendants had constructed a drain through a roadway which had been raised about two feet. A cavity then formed in the road, and M., a cabman, was injured through his horse falling into a hole. The defendants contended that the work had been properly executed, and that the hole was due to underground soakage. The plaintiff's answer was that the defendants knew, or had the means of knowing, that percolation existed, and could have provided against it. The jury found there was no negligence, and Harding, J., entered judgment for the defendants.

Held, on appeal by Cooper, Chubb, and Real, J.J. (reversing the judgment of Harding, J.), that the corporation were discharging a public duty, and that the hole being caused by the construction of the drain, the *onus* was on them to show that the work had been properly done; that, on the evidence, their officers must be taken to have been aware of the soakage, and had not taken precautions to prevent it; that the defendants had been guilty of negligence, and that the finding of the jury was unreasonable, and that there should be a new trial.

MOTION that a judgment of Harding, J., on a verdict of a jury in favour of the defendants, might be set aside and judgment entered for the plaintiff, with damages to be assessed, or for a new trial on the ground that the findings of the jury were contrary to the evidence and to the directions of the judge, and perverse.

The plaintiff, a cabman, was injured by his horse slipping in a hole over a drain constructed in Ann Street, Fortitude Valley, and sued the defendants for £2,000 damages for negligence and carelessness in the construction of the drain. The defence was a general denial of responsibility to maintain this part of the road, that there was no negligence on their part, and that the street had always been maintained in a safe condition.

The facts are fully set out in the judgment of Cooper, J.

Lilley, and *Dickson*, for appellant; *Sir S. W. Griffith*, *Q.C.*, *A.G.*, and *Feez*, for respondents.

Lilley: Defendants had delegated their duty to someone else, but by so doing could not escape responsibility. If the corporation had exercised proper supervision over the disturbing of the roads, the cavity would have been discovered. During the construction of the drains of the Empire Hotel, which was going on at the same time as the construction of this sewer, Mr. Gailey, the defendants' architect, found distinct subsidence. There was no evidence given by the defendants of any channel by which the earth missing from the cavity could have got away. The evidence did not show there was proper ramming. The defence relied on was that there was percolation. Mr. Justice Harding told the jury the defendants must account for the hole. If the defendants were not aware of the defect, they were responsible if, by ordinary precautions, they could have known it. *Penhallow* v. *The Mersey Dock and Harbour Board*, 30 L.J. (N.S.), Ex. 329; 1 L.R., E. & I., 93. As to the percolation, *Metropolitan Asylum District (Managers)* v. *Hill*, 47 L.T. (N.S.), 29, was cited.

Sir S. W. Griffith: The jury found there was no negligence, and the finding was reasonable. *Phillips* v. *Martin*, 15 App. Ca., 193, was referred to. If the plaintiff's contention is right every local authority in the colony would become insurers to every person passing along the road. To carry out their duties local authorities have to disturb the surface of the earth. If they exercised reasonable care in replacing it, they could not be held liable for negligence. The jury found reasonable care was exercised. The question as to where the earth had gone to was not raised at the trial. The drain was properly constructed. There was no indication of probable soakage. The verdict of the jury should be upheld.

Feez: Plaintiff brought no evidence to show the drain was improperly constructed. The council took every precaution. Scientific witnesses explained where the soil had gone to.

Lilley in reply: Defendants are in a dilemna. If the tunnel was improperly rammed, there was negligence. If it was properly rammed, there was the cavity to be accounted for, and they say that was due to soakage. That being so, they must have known of it, and ought to have provided for it. The verdict should be set aside.

COOPER, J.: In this case the facts appear to be as follows:—Some years ago the surface of Ann Street was raised by a deposit of earth, and the tram-line was laid upon it. It became necessary about four years ago to construct a drain across Ann Street through the deposit of earth which had been made there. That was done by excavating the tunnel under the tram-line. The drain pipes were laid in the tunnel, and earth was shovelled in towards where a man was working, and it is alleged that it was carefully and properly rammed by the defendants' servants. On 28th May last at night, a cabman driving along the road was thrown from his cab violently, and very severely injured, in consequence of his horse having put his foot through the surface of the ground over this drain. Afterwards, when the drain came to be examined, it was found that there was only a crust of earth of about 2 inches in thickness on the surface, and a cavity was formed extending to a considerable extent. Now, the defendants say they were not guilty of negligence in respect of this matter, and that the cavity came into existence by accident. *Prima facie* the fact that the horse fell in the fashion that it did, and that the cavity existed, was evidence of negligence on the part of the defendants, and it became their duty to show, in order to relieve themselves from the claimed damages, that they were not responsible for what took place. Now, they attempted to do that by calling a number of witnesses to show that the tunnel which they excavated in that place was properly, and to the best of their ability, filled up. Notwithstanding that there is the apparent fact that a large quantity of earth, which they alleged that they put into that place, has actually disappeared. That being so, in my opinion the *onus* was on the defendants to show conclusively how that earth had disappeared. They have not done so. All they have done is to suggest that the earth has been washed away by some underground soakage of water. The Attorney-General says "If you disturb the earth in any place, and you make a drain, no matter how carefully you may put the earth back again, water will always find its way along the drain supposing that the drain has a fall as this one had." And he says that the jury must have been supposed to be cognisant of the ordinary laws of nature, namely, that water will flow downwards where it finds the least resistance. He says they must also be assumed to know that water will carry light soil with it into the adjacent country. But the municipality were bound to know that as well as the jury, and if, when they made this excavation, they found the soil was of such a character that it would be likely to be washed away by the water which must necessarily go through, they ought to have taken precautions to prevent it. It seems, however, that the construction of the drain occupied a very long time—nearly six months—and the defendants allege that during all that time they never saw any soakage. It is perfectly apparent if there were no soakage there could not be an underground current, soakage can only come in the wet seasons; and there is the evidence of Mr. Gailey that, in that neighbourhood, he had noticed soakage before. The defendants were bound, in my opinion, to know all that Mr. Gailey knew in respect of that matter. If that is so they were under a double obligation to take reasonable precautions to prevent the earth being washed away. That they did not do so is apparent, therefore, I think the verdict of the jury was wrong, and cannot be supported. It ought to be set aside and a new trial granted.

CHUBB, J.: I am also of opinion that there should be a new trial on the ground that the verdict was not one that reasonable men should have found. The action was one of negligence, of which the *onus* is on the plaintiff. Here was a corporation performing a statutory duty imposed upon them by law—that of interfering with the roadway. They made a drain; subsequently the plaintiff was injured through his horse putting his foot into a hole immediately over the spot where the drain was constructed. The hole being there, negligence is presumed; and it is for the defendants to displace the liability. The defence

they set up was that there was no negligence because the work was properly done. And assuming that the work was properly done, the injury sustained by the plaintiff was attributable to an underground soakage of water which caused the cavity, and the injury was due to that cause and not to any negligence on the part of the defendants. In answer to that the plaintiff says there was no percolation at all, or if there were the defendants knew, or had means of knowing, that in that locality there was percolation, and should have provided against it. In performing a statutory duty the corporation must use the best skill and diligence and caution in the exercise of it. In the case of *The Mersey Docks Trustees*, mentioned by Mr. Lilley, The Chief Justice said: "We are of opinion that he is not liable for an injury which he not only did not foresee, but could not foresee, etc." That certainly implies that, in the opinion of those who concurred in that judgment, the defendants would have been liable if they had not used the best skill and diligence. If there were no percolation, then the cavity can only be accounted for by negligence. That is to say, in making the drain the defendants did not put enough earth in to prevent a hole being caused there. So that, in that view of the case, there would be clear negligence for which they would be liable, and there would be no answer. If there were percolation, it was the defendants' duty to provide against it. On the authority of the case referred to by Mr. Lilley, where, having the knowledge or the means of acquiring that knowledge, if they did not take reasonable care to provide against injury which was likely to accrue, that would be neglect of duty. The defendants called witnesses who swore that the work was properly done so far as they were able to depose to the fact. There was proper ramming, and therefore it is believed the space was properly filled; but nevertheless here is a large hole in which several cart-loads of earth have disappeared. It is attempted to explain that by saying that there was underground soakage which washed the soft soil into the stiffer soil lower down. They should have examined this soil to find out whether that was so or not, but they merely threw it out as a suggestion. If that was a good defence they should have shown conclusively that there was no doubt whatever about the ramming, so that the injury would have been attributable to percolation only, and could not by any possibility be attributed to bad ramming. My opinion is that the jury did not consider the evidence, or if they did, they did not come to a reasonable conclusion upon the evidence. I do not wish to say any more upon the subject because the case may go to a new trial, and it is not desirable now to discuss the evidence in detail. For the reasons I have given I concur with Mr. Justice Cooper that there should be a new trial.

REAL, J.: I am of the same opinion. In this action it is incumbent on the plaintiff to prove negligence. The defendants have the care, construction, and management of roads, and the care, construction, and maintenance of drains and sewers. The road, where the accident happened, has been brought to its present level by first raising its surface with loose earth to a height, variously stated at from 18 inches to 2 feet, and then placing 18 inches of macadam above that. A drain has been constructed through that by the defendants, and this accident occurred in consequence of a cavity existing in the formation of the road at the place where this drain was constructed. That cavity was about 18 inches deep, 2 feet wide, and extended several feet in length. At the place where the accident actually occurred, the surface crust between the cavity and travellers was something like 2 inches thick. A road constructed in that way is necessarily a trap, and consequently the fact of the road being in that state is *primâ facie* proof of negligence. Then it becomes the duty of the defendants to rebut that charge of negligence. They attempted to do so in two ways. First, they say that when they constructed the road it was not in a defective condition, and they did not leave it in a state which, under ordinary circumstances, would have brought it into that condition. In other words,

that they constructed the drain in a proper and substantial manner, according to the ideas of men engaged in that business. Secondly, that they had no means of discovering that the state of the road was such as it was at the time of the accident, and had no reason to suppose that any forces were at work which would bring about that state after they had properly constructed the road. They called several witnesses to prove that if you construct a drain and ram it piece by piece horizontally, it would be equivalent to ramming it vertically, and would be safe. Their case is that they did so construct the drain, and consequently, if the road was in the state it has been sworn to have been found in at the time of the accident, the change must have been brought about by some force of nature sufficient to remove the earth, and thus cause the cavity; and that force they allege was the soakage water. They say that the soakage of water did it. It is incumbent upon them, therefore, to show that they could not foresee and guard against this damage by soakage of water, by showing that there was a soakage, and that there was evidence of the taking away of the soil thereby, as pointed out by Mr. Justice Cooper, or to show conclusively that when they constructed the drain they left the road in an absolutely good condition. By "absolutely" I mean so far as they were bound in the course of their duty. They called witnesses to show that by the terms of the contract it was the duty of the contractor to ram the earth, and argue that, apart from any evidence to the contrary, he would be presumed to have performed his duty. But when we find something that would not exist if he had done his duty, it rebuts that presumption. Then they call witnesses to show that the work was properly done. One of them rammed some five feet of it, and was about there the whole time—about six months. (Mr. Gailey says: "twelve hours should have been enough to do all the work.") He only rammed 5 or 6 feet, and the process was to throw in the earth to the man in the drain. Other persons rammed the balance, and he believed it was done properly. This is all the evidence of the actual ramming. There is at once a defect in the proof that the whole tunnel was properly rammed, consequently, if we find the soil absent, the question is: are we to look for an unknown force of nature? Does the presumption that the men perform their duty well compel us to say or authorize a jury to find that there was some unknown force of nature at work rather than conclude that they who did the work did not do it properly? A man may be presumed to have performed his duty unless there is something to show the contrary; but when something exists which could not exist if he had performed his duty, unless some unknown force of nature were at work, must it be presumed that there was an unknown force? If they had called witnesses to swear that the work was, in fact, done in a particular manner, and scientific witnesses to say that that was the proper course according to the knowledge of the age, the jury would be at liberty to believe them. But it appears to me that they fail in proving proper filling and ramming with that conclusiveness which would be necessary to enable the jury to arrive at a verdict for defendants by finding the defect to have arisen from some unknown force of nature. Assuming, however, that they did prove that sufficiently, what force do defendants say caused the defect? Soakage; which their witnesses say was found from time to time in wet weather. But can this be called an unknown force? Should not defendants have known of that? Was it not within the knowledge of their officers? Must not that knowledge be imputed to them? Mr. Gailey, in constructing a drain which was under their supervision, within three hundred yards of the place, discovered it; and it caused the drain made by him to subside. Mr. Gailey was at work on his drain during the whole time the defendant corporation appear to have been making the sewer, because he says in his evidence he was compelled to wait until the sewer came up to him, and whenever rain came soakage appeared. Therefore it must be taken that they knew. The knowledge of the soakage must be imputed on the principle

laid down in the case cited at the bar and referred to by Mr. Justice Chubb. What provision was made against soakage? One of their own witnesses says, if soakage were there, he should make some provision for it; and another witness says, no provision was made. So that, if soakage caused the accident, and the defendants' contention that the earth was properly filled in and rammed is correct, then the defendants were guilty of negligence in not having taken some precautions to prevent the consequence of that soakage, for there is no evidence that they could not forsee it. The evidence of all the witnesses is that, if the soakage were known, some precaution should have been taken, and from the evidence of one witness no precaution was taken. It appears to me that the defendants are on the horns of a dilemma. They brought a witness who swore he rammed some of the earth, and if they had proved that all the earth was properly rammed, and there was no evidence of soakage, I would say: "Well, I find it hard to believe you, but the jury have chosen to believe you, and there is an end of it." My view of the matter is that they must have known of the soakage, and their defence is that soakage caused it. If they had brought witnesses to show that the earth in the whole tunnel was rammed, and no evidence of soakage, the conclusion of the jury would not be disturbed. Perhaps it is better for me not to refer at greater length to the facts, because the case may be tried again. The defendants, by their own evidence, have shown that they took no precautions against the effect of soakage, and that, if the earth was properly rammed, the absence of such precautions caused the accident. For these reasons there should be a new trial.

Solicitors for plaintiff: *Lilley & O'Sullivan.*

Solicitors for defendants: *Macpherson & Feez.*

Re A. S. LESLIE AND COMPANY, INSOLVENT.

Bills of Sale Act of 1891 (55 Vic., No. 23), ss. 3, 4, 6, 7, 10, 19—Bill of Sale executed before Act — Defeasance in separate document—Registration—Possession.

Leslie executed a bill of sale in favour of the Royal Bank on 18th April, 1891, and at the same time another agreement containing a defeasance was executed. About the same time (the exact date being disputed) he wrote to the bank proposing certain modifications of the terms of the bill of sale and agreement, to which the bank agreed. The bank took possession of the chattels assigned by the bill of sale in December, 1891, but Leslie remained on the premises as the bank's servant, and sales were effected with his knowledge till he committed an act of insolvency on May 2nd, 1892. He was adjudicated insolvent on May 21st. Between these two dates the bank sold the rest of the goods and retained the proceeds.

On March 4th, 1892, copies of the bill of sale and agreement were filed in the Supreme Court, and an affidavit of the attesting witness was annexed to the two documents.

The letter of Leslie and reply thereto (of disputed dates) were not registered, nor written on the same paper as the bill of sale. The agreement made at the same time as the bill of sale was not written, nor was any part of it written, on the same paper or parchment as the bill of sale.

Held, by Harding, J., (1) that the bill of sale and agreement were executed on 18th April; (2) that the letter of Leslie and the reply were not sent before the execution of the bill of sale, that there was no consideration for them, and that they did not constitute a defeasance; (3) that if the bill of sale and agreement were separate documents, they were registered in the only way possible; (4) that as the registration was sufficient it was unnecessary to consider the effect of possession by the bank; and (5) that a motion by the trustee to declare the bill of sale void should be dismissed with costs.

Held, on appeal by Cooper, Chubb, and Real, JJ. (reversing the decision of Harding, J.), that the letter and reply were sent before the execution of the bill of sale and agreement, that these letters constituted a defeasance to the bill of sale, and not being registered with the bill of sale, the registration was void; that the bill of sale and agreement were distinct and separate documents, not written on the same paper or parchment, and were not attached in any way prior to or at the time of registration; that the bank had only a qualified ownership till 1st April, 1892; that the bill of sale became inoperative on that date; that the bank was entitled to reduce Leslie's debt by the proceeds of the sale up to 2nd May; that an enquiry should be directed as to the value of the goods sold after 2nd May, and should pay the trustee the amount of such value; and that the bank should rank with other creditors as to the debt due on 2nd May.

MOTION before Harding, J., on 13th September, 1892, for a declaration that a bill of sale, dated 18th April, 1891, executed by A. S. Leslie, an insolvent, in favour of the Royal Bank of Queens-

land, Limited, had become and was inoperative and void as against the trustee in respect of the chattels comprised therein, as from 1st April, 1892, and that it might be ordered that, in so far as the bank had not realised the chattels, the same might be delivered up by the bank to the trustee, and further, that in so far as the bank had realised on the chattels since 1st April, 1892, an inquiry might be directed as to such chattels and their value.

Byrnes, S.G., and *Shand*, for the trustee; *Sir S. W. Griffith, Q.C.*, *A.G.*, and *Macdonnell*, for the Royal Bank.

The facts appear from the judgment.

HARDING, J.: The facts in this case up to a certain point have been correctly stated by the Solicitor-General, and no variation has been suggested by the other side. As to the ones upon which there is a conflict of evidence, namely, whether the bill of sale and agreement were executed on April 18th, or whether the letter from Leslie to the bank, dated April 20th, formed a defeasance to the bill of sale, I find that the bill of sale and the agreement were executed on April 18th, and that the letter was not sent nor answered before the execution of the bill of sale and the agreement. With these additions, the facts as stated by the Solicitor-General are uncontradicted, and it is therefore unnecessary for me to repeat them. There appears to me to be no necessity for the seal of the bank to the bill of sale and the agreement, so far as they constituted a bill of sale over Leslie's property to the bank. The bank had obtained a completely executed security by Leslie. In regard to Leslie's letter to the bank, it was sent after the bill of sale and agreement had been completed, and there was, therefore, no consideration for it. It in no wise affected the bill of sale further than that it showed a willingness on the part of the bank to afford all reasonable facilities to Leslie, the bank at the same time retaining its pound of flesh in the shape of the executed bill of mortgage. The sections of *The Bills of Sale Act* which apply to this case, 6, 7, and the proviso to section 19, are difficult of construction, but if the construction urged by the Solicitor-General is to be put upon them, then I will have to be satisfied that the Act intended to destroy a title good at the time at which it required the registration of the bill of sale, notwithstanding that the mortgagee up to the last moment before the date on which registration was necessary, had an absolutely good title, but by reason of the disability of the mortgagor it could not be put into the form of registration required by the Act. Section 7 provides that "every bill of sale executed before the commencement of this Act must be registered as prescribed by this Act within three months after the commencement of this Act, unless it has already been registered under the enactments hereby repealed; otherwise each bill of sale shall, at the expiration of three months after the commencement of this Act, become inoperative as to any chattels comprised in it, whether as between the parties to it, or as against any other person." Under that clause bills of sale must be registered as prescribed, or become inoperative. Section 6, sub. 1, prescribes that "The bill of sale, with every schedule or inventory annexed to it, or referred to in it, or a true copy thereof, and of every attestation of the execution thereof, together with an affidavit truly stating the time of the execution of the bill of sale, and the residence and the occupation of the person making it; or if it is made under, or in the execution of the process of a court of law, then the residence and occupation of the person against whom the process was issued, and also in either case stating the residence and occupation of every attesting witness to the bill of sale shall be filed in the registry." Subsection 2 provides that "if the bill of sale is made subject to any defeasance or condition, or declaration of trust not contained in the body of the bill of sale, such defeasance, condition, or declaration shall be deemed to be part of the bill of sale, and shall be written on the same paper or parchment before the registration, otherwise the registration shall be void." If, after the passing of the Act, a bill of sale is executed, it will be unsafe to have a bill

of sale and the defeasance on two separate documents, or, in other words, on two separate pieces of paper; but such a thing as that was not unknown, and not illegal before the passing of the Act, and a good title could have been obtained under such circumstances. Consequently, where, before the passing of the Act, a bill of sale was executed with the defeasance in a separate document, it becomes necessary either for the mortgagee, before three months have expired, to obtain a new bill of sale from his mortgagor, or to register such as he has, or to allow the Act to say that it is such a bill of sale as cannot be registered, the consequence of its non-registration being for it to become inoperative. I, however, think the meaning of the section is that, after the passing of the Act, all bills of sale with a defeasance must be on one paper—one connected body of matter. With regard to bills of sale and defeasance made before the passing of the Act, it is sufficient if the two are copied and filed together. I find that has been done in this case, and I think that the bill of sale and agreement, though they were separate documents, were registered in the only way they could have been registered, and I think they have been registered within the meaning of ss. 6 and 7. This is a sufficient decision for the upholding of the bill of sale as against the motion of the trustee made to-day. The Attorney-General has contended that there is no necessity for registration at all, but as I have ruled that the registration is sufficient, it is not necessary for me to decide that point now. The motion will be dismissed with costs.

The trustee appealed from this decision, and the question then arose whether *The Supreme Court Act of 1892* applied to appeals in insolvency, as the rules governing insolvency matters are different from those regulating the practice under *The Judicature Act*. The appeal was accordingly adjourned till the December Full Court, and came on for hearing before Cooper, Chubb, and Real, JJ.

Byrnes, S.G., and *Shand*, for the trustee; *Sir S. W. Griffith, Q.C., A.G.*, *Lilley*, and *MacDonnell*, for the Royal Bank, respondents.

Byrnes, S.G.: Section 6 of *The Bills of Sale Act of 1891*, enacts that, if a bill of sale is not registered in accordance with the Act, it becomes void and inoperative. There is another question purely of law. A bill of sale, bearing date 18th April, was executed—whether on the 18th or 20th did not matter. The evidence taken on the motion showed that the bill of sale was in the ordinary form of an instrument of that nature, but on the same date as the bill of sale was executed, a document of entirely different nature was executed. This latter document, which was a defeasance or condition, was executed between the same parties. The defeasance declared that, if certain things were done, practically that the bill of sale should become cancelled. It is submitted that there can be no doubt that this was a defeasance or condition on the bill of sale, and it was a document entirely distinct from the bill of sale. My contention is that it must be a piece of paper attached and forming part of the same instrument. In this case it was entirely distinct and different. Besides that defeasance there was also a letter written by the insolvent to the respondent bank on 20th April, 1891, which constituted a further condition to the bill of sale. This second defeasance was never registered. The letter was replied to by the bank on the same date. In the defeasance the bank agreed to keep this bill of sale secret. The defeasance was not written on the same piece of paper. It was stamped differently, and on different paper. The respondents contend that they were in possession, and that *The Bills of Sale Act of 1891* does not affect their right of possession. As they kept the bill of sale secret they cannot escape from the operation of that Statute. The promissory notes given by the insolvent also constituted a defeasance, and they did not appear in the body of the instrument, nor were they on the same piece of paper. The registration was therefore defective. *Newlove* v. *Shrewsbury*, 21 Q.B.D., 41; *Mills* v. *Charlesworth*, 25 Q.B.D, 421. The Act should be construed literally. *Counsell* v. *London and Westminster Loan Company*, 19 Q.B.D., 512, 514,

515. In this case the defeasances were distinct documents, and only pinned to the bill of sale. The bill of sale should be declared void, so far as the goods and chattels covered are concerned, and judgment should be in terms of the motion.

Sir S. W. Griffith, Q.C., A.G.: The trustee does not stand in any better position than the debtor. He does not claim under *The Insolvency Act* or the old *Mercantile Act*, which gave a better title to the trustee than to a debtor. Unless Leslie was entitled on April 1st to bring an action against the bank for the recovery of the goods in question, then the question arises—what were the respective rights of Leslie and the bank on April 1st? Was the insolvent entitled to recover this property on that date? The bill of sale was good against the world during the month of March. The property belonged to the bank The bill of sale was properly executed. Otherwise bills of sale executed before the Act, and in which possession had actually been taken and property disposed of, were voided, and the mortgagees of these antecedent bills of sale are entitled to recover the property. *Booth* v. *Hutchinson*, 15 Eq. Ca., 30; *Jack* v. *Kipping*, 9 Q.B.D, 113; *Marples* v. *Hartley*, 3 El. & El., 610; *Piercy* v. *Humphries*, 17 L.T., 463; *Brignall* v. *Cohen*, 21 W.R., 25. The Act only applies to bills of sale unaccompanied by possession. According to Lord Blackburn in *Cookson* v. *Swire*, 9 A p. Ca., 653, possession is equivalent to registration. [REAL, J.: The Legislature has used new words, and we have to find out their meaning.] There is nothing in the Act to divest the mortgagee of his property and give it back to the mortgagor. There never has been any distinction between a bill of sale accompanied by possession, and a bill of sale followed by possession. The construction should be reasonable. There is no authority for the proposition that where possession has been taken under a bill of sale the title can afterwards be impeached. The best title by common law is possession. The possession was lawful in its origination. As to whether legislation was retrospective in its action, *Maxwell*, 257, and *in re Ashcroft*, 19 Q.B.D, 195, were cited. Titles acquired under the existing law are not disturbed by subsequent legislation, unless distinctly so stated. *Fenton* v. *Blythe*, 25 Q.B.D, 417; *Hickson* v. *Darlow*, 23 Ch.D., 690, 692. Leslie gave the bank a perfect title. [REAL, J.: The bank had possession of the goods to which, under the existing law, they had a perfect title, but then the Legislature came in and limited the period which they were entitled to hold the goods. Parliament has declared in its wisdom that bills of sale shall be inoperative after the 31st March unless there is registration, and then that there shall be registration at the end of twelve months, or that the bill of sale will then be inoperative. That may be perfectly absurd, but that is how it strikes me.] If that is so, we have no title at all. But it is contrary to all rules of the Statutes, which the Legislature may be presumed to know. As to the set-off, *Eberle's Hotel Co.* v. *Jones*, 18 Q.B.D., 459, was cited. As to the defeasance, it is only necessary to have the documents incorporated. *Burdekin* v. *Potter*, 1 Dowl. (N.S.), 134. With regard to the letter written by Mr. Leslie, which it was contended varied the bill of sale, the letter was fraught with a considerable amount of suspicion. There was no record of it in the bank, and the extraordinary part of the matter was that it was addressed to the sub-manager, whereas all previous communications had taken place through the manager. [REAL, J.: There is evidence that the bank received a letter.] Mr. Justice Harding found that no consideration was given, and that the varying was, therefore, inoperative. Apart from that, however, it was manifest that there were serious suspicious circumstances connected with the letter. It was literally sprung on us at the trial.

Byrnes, S.G., in reply: No set-off can exist in a case like this. If the bank set aside the bill of sale and relied upon the fact Leslie had given them possession of the goods, it might be a fraudulent preference. *Ex parte Griffith*, 23 Ch.D., 69. The respondents took possession under the bill of sale. Their rights under it determined on April

1st if the registration was defective. They have no claim to the goods disposed of after April 1st.

C.A.V.

COOPER, J. · This is an appeal from a decision of Mr. Justice Harding, pronounced on 18th September last, on a motion by the trustee in the insolvent estate of Leslie & Co., made under *The Insolvency Act of 1874*, for a declaration that a bill of sale given by Leslie to the Royal Bank of Queensland became inoperative and void as against the said trustee, on 1st April last, by virtue of the provisions of *The Bills of Sale Act of 1891*, and for an order directing certain relief claimed in consequence. In April, 1891, Leslie, who was a warehouseman, trading as Leslie & Co., being largely indebted to the Royal Bank and desiring further advances, executed two instruments, which have been called respectively the bill of sale and the agreement, to which the bank, through its manager, agreed. Leslie having made default, the bank in December, 1891, entered into possession of the chattels assigned by the bill of sale, and in February, 1892, painted out Leslie's name on the warehouse, and substituted that of "the Edward Street warehouse." Leslie, however, remained on the premises as the bank's servant, and sales were effected with his full knowledge and concurrence till he committed an act of insolvency on 2nd May. He was adjudicated insolvent on the 21st of the same month. Between these dates the bank sold all that remained of the chattels, and retained the proceeds of the sale. Two questions present themselves for our determination in this case; the first—one of mixed law and fact—is whether the bill of sale was properly registered or not. There is unfortunately a dispute as to the facts on this point, and I am reluctantly compelled to differ from the view taken by the learned Judge in the Court below, who had the advantage of observing the demeanour of such witnesses as were examined orally before him. It was then contended that the bill of sale (exhibit 1) and the agreement (exhibit 2) were executed on 18th April, 1891, and that Leslie's letter to the bank (exhibit 10) and the bank's reply (exhibit 11) were written on 20th April; and even if in terms they purported to modify the conditions of the two former documents, they were without consideration and void. And it was disputed that the copy produced by Leslie (exhibit 10) was a true copy of his letter to the bank. A careful consideration of the documentary evidence, coupled with the fact that the bank's manager was never examined, leaves no doubt in my mind that the instruments, exhibits 1 and 2, were not executed till 20th April, and after exhibit 10 was written and answered by exhibit 11. Holding this view of the facts, I am of opinion that exhibit 10 contains conditions intended to modify the terms of exhibits 1 and 2, and that, consequently, it ought to have been registered. It is therefore unnecessary to decide whether exhibits 1 and 2 were written on the same paper, or form substantially one instrument. It follows that the bill of sale—the whole contract between the parties—was never registered. And the second question, one purely of law, now arises: What are the respective rights of the trustee and the bank as to the chattels comprised in the security? The answer depends upon the true construction of section 7 of *The Bills of Sale Act of 1891*, which declares that every bill of sale executed before the passing of the Act, and not registered under the old law, unless registered before 1st April in this year, "becomes inoperative as to the chattels comprised in it, whether as between the parties to it, or as against any other person." The bill of sale was executed on 20th April, 1891, and was never registered because, although exhibits 1 and 2 were registered on 4th March, 1892, exhibits 10 and 11 were not. It was argued on behalf of the bank that, inasmuch as they had gone into possession by virtue of a subsisting bill of sale, their title to the goods became perfected as against all the world, and that neglect to register before 1st April could not, by making the security inoperative, divest the bank of their property and transfer it to the trustee of Leslie's estate. The fallacy in this reasoning seems to me to be the assumption that

taking possession by virtue of a bill of sale under the law as unaffected by the Act of 1891, conferred absolute ownership upon the grantee. I am of opinion that the grantee in possession had only a qualified ownership—an absolute right to sell until 1st April, and after that date a right to sell with the concurrence of the grantor so long as he continued under no legal disability to give his consent. At any time before sale the grantor could redeem the goods by paying the amount due upon them. When, however, he became insolvent, his capacity to consent to any disposition of the goods by the grantee passed from him by operation of law, and the grantee being in possession under an inoperative instrument, his title was extinguished, and any dealing by him with the property afterwards became unlawful. Regarding the law in this light, I am of opinion that the bank were entitled to reduce Leslie's debt by the proceeds of sales until 1st April, 1892, and after that by the proceeds of sales made with Leslie's concurrence until the act of insolvency in May. After 2nd May, I think all sales effected by the bank were wrongful as against the trustee, and that they are responsible to him for the true value of the goods at the time of sale. The order will therefore be: Reverse the judgment of Harding, J.; declare that the bill of sale executed on 20th April, 1891, became inoperative on 1st April, 1892. That the bank are entitled to reduce Leslie's debt by the proceeds of all sales up to 2nd May. Direct an inquiry as to the true value of all goods sold after 2nd May, and order that the bank pay to the trustee the amount of such value. As to the debt due to the bank on the 2nd May, they are to rank with the other creditors of the estate.

CHUBB, J., said: After reviewing the facts, upon the evidence before him, Mr. Justice Harding came to the following conclusions:— 1. That the bill of sale and agreement bearing the same date, Nos. 1 and 2, were executed on 18th April. 2. That the letter, No. 10, was not sent or answered by No. 11 before the execution of Nos. 1 and 2; that there was no consideration for Nos. 10 and 11, and that they did not constitute a defeasance to Nos. 1 and 2. 3. If Nos. 1 and 2 are separate documents, they were registered in the only way they could be, and in His Honour's opinion, within the meaning of sections 6 and 7 of *The Bills of Sale Act of 1891*. The case thus made raises the question of the true construction of the recent Statute affecting bills of sale, and, in particular, as regards bills of sale executed before the commencement of the Act, and not registered before 1st April, 1892, where the grantee has before that date taken possession of the chattels. The question is one of general importance. If His Honour's findings upon the facts are undisturbed, and he has correctly interpreted the Statute, *cadit quæstio*, the appellant's case fails. The first question then for our consideration is whether we ought, assuming that we take a view different from that of His Honour of the evidence, to interfere with his findings. That we have power to do so cannot be doubted. As a general rule the Court of Appeal will be slow to interfere with the findings of the Judge below on questions of fact, more especially where, as in this case, he has had (what we have not) the opportunity of hearing the witnesses, always a great assistance in arriving at the truth. But it appears to me that, if we can form a clear opinion from materials not reasonably open to doubt, it is our duty, if we differ from the learned Judge on the facts, to give effect to our opinion. I have come, upon what appears to me to be clear, cogent, and convincing evidence, to the conclusion that the true date of the bill of sale was the 20th and not the 18th of April, and that the letters (Nos. 10 and 11) were respectively sent and received before the execution of the bill of sale. To my mind the entries in Mr. Naylor's diary and the context of the letters are conclusive as to the date of execution. On the ground, therefore, of untrue date, the bill of sale is, in my opinion, void, for want of compliance with the provisions of sections 6 and 7 of the Act. Again, if the letters Nos. 10 and 11 constitute a defeasance or condition to the bill of sale, then, not being contained in the body of the instrument, nor written on the

same paper before registration, or at all, and not having been registered, then the bill of sale is void on this ground (*Counsell* v. *London and Westminster Loan and Discount Company*, 25, Q.B.D. (C.A.), 512). I think that Nos. 10 and 11 do amount to a condition. No 10 refers to the agreement (No. 2), which must be construed either as part of the bill of sale, or as a defeasance or condition to it, and it (No. 10), in paragraph four in particular, makes an alteration in the time as regards overdue bills, the subject of the agreement (No. 2) upon the non-performance of which depended the right to enforce the bill of sale. In my opinion, therefore, the bill of sale is void on this ground. I think also that the agreement (No. 2) admittedly not contained in the body of the bill of sale, and admittedly a document written on different paper, kept apart, stamped as a separate document, and registered as an "agreement or condition," is a defeasance or condition to the bill of sale, and that it was not written on the same paper before the registration within the meaning of the Statute. Both in the affidavit of execution and in the registration receipt it is called a "condition," one of the terms used in section 6. "Written on the same paper," in my opinion, means not literally written or endorsed upon the same instrument, although that, if possible, would be the strict and best compliance with the Statute, but written on paper practically attached to the original bill of sale before the registration (*Burdekin* v. *Potter*, 1 Dowl., N.S., 134). It is, perhaps, just possible that, by a very liberal stretching of the evidence, the bill of sale and agreement No. 2 might be held to be in substance but one instrument, that together they constitute the bill of sale. I decline, however, to adopt that view in order to bring the documents within the protection of the very stringent clauses of an Act passed to prevent the very mischief which the parties intended to create here, namely, a secret bill of sale. Consequently the bill of sale is, in my opinion, void on this ground also. This being my view of the case, it follows that the registration being void, the appellant is entitled to succeed unless it can be maintained that the possession of the chattels by the bank on 31st March, 1892, rendered registration unnecessary, or in other words, that the bank had, as was contended, by reason of such possession, a good title against all the world. Now, by the 7th section of *The Bills of Sale Act of 1891*, it is enacted that "every bill of sale executed before the commencement of this Act must be registered, as prescribed by this Act, within three months after the commencement of this Act, unless it has then already been registered under the enactments hereby repealed; otherwise such bill of sale shall, at the expiration of three months after the commencement of this Act, become inoperative as to any chattels comprised in it, whether as between the parties to it, or as against any other person. Until such registration the bill of sale shall have the same effect as to any chattels comprised in it as if this Act had not been passed, and no greater effect." By the 8th section "the registration of a bill of sale, whether it was executed before or after the commencement of this Act, must be renewed once at least in every twelve months, and if a period of twelve months elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal, as the case may be, the bill of sale shall, except as hereinafter provided (the exception does not affect this case), become inoperative as to the chattels comprised in it, whether as between the parties to it or as against any other person." The commencement of the Act was 1st January, 1892, consequently, if registration was necessary to the bank's title, the bill of sale, not having been previously registered, should have been duly registered before 1st April, 1892. Now it is clear, and it was conceded in the argument by the counsel for the appellant, that the title of the bank was good against all the world up to and including 31st March, 1892, and if the bank had realised the security on that day at latest, the trustee would have had no claim. The bank was in possession, there had been no execution levied, and no act of insolvency was committed until 2nd May, conse-

quently there was no one to dispute the bank's title or possession. But not having realised the security, but holding the chattels in specie, what was the position of the bank on 1st April, 1892? The case was put in this way: The bill of sale gave title on 18th April, 1891. It assigned the property to the bank. The property passed to the bank by the deed on that date. The deed gave a right to take possession. When the bank took possession in December, 1891, it had property and possession. It had a good title at common law on 31st March, 1892, by possession. The bank was in the position of a pledgee at common law of the goods. The bank having perfected its title by taking possession, the bill of sale was *functum officio*—at an end—and no registration was necessary. The bank's title being lawful in origin, the trustee, standing in the insolvent's shoes, and having no higher right or better title than the insolvent, the insolvent could not have sued, neither could the trustee sue the bank except for redemption, which he could, of course, only get upon payment of the money due on the security. This was the argument. For this position the following cases on the question of possession were cited:—*Marples* v. *Hartley*, 3 E. & E., 610; *Piercy* v. *Humphries*, 17 L.T., 463; *Brignall* v. *Cohen*, 21 W.R., 25; *Cookson* v. *Swire*, 9 App. Ca., 653. Now, can the bank support the possession on the footing of a pledge? What is a pledge? It is a voluntary deposit of chattels by way of security. There must be an actual transfer of possession. No writing is necessary to create a pledge, but you may have a writing containing the terms on which the pledge is to be held. The possession is the pledgee's title. In the case of a bill of sale the title is by the instrument, whether the grantee has possession or not (*Ex parte Parsons*, L.R. 16, Q.B.D., 532). Is there here, as was said in that case, "any separate and independent transaction giving the bank the right to the possession of the goods" outside the bill of sale? Was there any pledge or any title to the chattels given apart from the instrument? First of all there is the bill of sale. Its existence is inconsistent with a pledge of the same chattels. Then it is stipulated that possession is not to be taken till default. None was taken till eight months after the bill of sale was given. Then it was taken adversely to the grantor. Then Mr. Macintosh says that when the bank took possession and afterwards sold, it did so "under the powers contained in the bill of sale." In my opinion there was no pledge, and the bank can only defend its possession by reference to the bill of sale, and if the bill of sale is void, the possession under it gives no title and is of no avail against the trustee (*Newlove* v. *Shrewsbury*, 21 Q.B.D., 41; *Ex parte Hubbard*, 17 Q.B.D., 690; *Mills* v. *Charlesworth*, 25 Q.B.D., 421; *Morris* v. *Delobel Flipo*, 1892, 2 Ch., 352). The Attorney-General contended that to hold that the bill of sale is void *ab initio*, in respect to the property in the bank's hands on 1st April, 1892, would produce a manifest injustice. That instead of the bill of sale becoming inoperative, it would be very operative indeed, as upon this construction the instrument would operate to revest the chattels in the grantor. If the argument of the Attorney-General is right, that in the case of a bill of sale executed after the commencement of the Act, and registered, no renewal of registration is necessary, if possession has been taken before the twelve months have expired—if this is so, it is apparent that the object of section 9 would be defeated, which requires on every renewal of registration the filing of an affidavit stating the amount then due on the security. And, once in possession, the bill of sale may by force of the possession be kept alive for any indefinite period, the grantee not being compelled to sell, and the grantor and creditors could only know by an expensive suit, perhaps, how much was really owing on the security. The intention of Parliament was certainly to strike at secret bills of sale. If, therefore, possession without registration, or renewal of registration conferred a good title, the whole object of the Act would be defeated. It is sufficient to say that the Legislature has said no such thing. Here Parliament has said if certain things are not done the bill of sale is to

become inoperative between the parties to it as well as against any other person. The words are plain enough and wide enough to mean, and I think they do clearly mean, that in default of due registration, the title of the grantee to the chattels comprised in—that is covered by—the bill of sale, and which are in his hands, possession, or control, at the expiration of the time allowed for registration, is completely gone. Consequently on 1st April, 1892, Leslie would have been entitled in an action of detention against the bank to recover the chattels in specie—*Eberle's Hotel and Restaurant Company* v. *Jonas*, 18 Q.B.D., 459. The property in the chattels and that right of action passed to the trustee, and vested in him on 2nd May, and as the bank sold the chattels after the trustee's title had accrued, the bank is liable to the trustee for their conversion. The bank is clearly liable to pay the value of the chattels on 2nd May. With respect to the chattels, if any, sold between 1st April and 2nd May, I think the bank is entitled to retain the proceeds thereof, and to apply the net receipts in reduction of the debt. I come to this conclusion because under the agreement of 8th February, 1892, the business was carried on from that date as a going concern by Leslie, with the assent and under the supervision of the bank, and on its account. All money received by the bank under this arrangement would be money received to the use of Leslie, and a simple debt due to Leslie, against which the bank, under section 150 of *The Insolvency Act*, is entitled to set off Leslie's debt due to the bank, the debts being mutual. The expenses of carrying on the business during that time must be charged against the receipts, and that is why I say that the bank should not be compelled to give credit in account for more than the net proceeds. The correct amount can, if necessary, be ascertained on inquiry. For these reasons I think the appeal must be allowed, and with costs, including the costs of the motion in the Court below.

REAL, J.: In this case the appellants' claim is founded on an alleged want of registration of the bill of sale under the provisions of *The Bills of Sale Act of 1891*. It is conceded on their part that, if registered, it is valid against the trustee. The respondents, however, also contend that possession of the goods comprised in the bill of sale by the grantee, before and on April 1st, and thenceforward to the insolvency of the grantor, renders registration under the Act unnecessary to the validity of the grantor's title to such goods. The first question for consideration is whether the bill of sale was duly registered. The undisputed facts in connection with registration are that, on 4th March, 1892, copies of the bill of sale and agreement (exhibits 1 and 2) were filed in the proper registry for the registering of bills of sale; that when they were so filed an affidavit was filed stating that the time of the execution was 18th April, 1891; that the letter from Leslie, dated 20th April, and the reply thereto, were not registered; that the promissory notes were given as provided by the agreement (exhibit 2), but they were not, nor were copies of them, registered; that the letters of 20th April were written, sent, and received on 20th April; that these letters were not written on the same paper or parchment as the bill of sale; that the paper on which the agreement (exhibit No. 1) was written was not, nor was any part of it, at any time before registration, on the same paper as the bill of sale was written. Under subsection 2 of sec. 6 of *The Act of 1891*, which is a re-enactment of the substance of a section of *The Mercantile Act*, if a bill of sale is made subject to a defeasance not contained or written therein, and not registered, the bill of sale is void. Even a verbal agreement, if made before the execution of the bill of sale, has been held to be a defeasance, and has resulted in a bill of sale being held void—*Ex parte Southam*, 17 Eq. Ca, 578. It is therefore necessary in this case to ascertain whether the letters from and to Leslie on 20th April were written, sent, and received before the bill of sale was executed. Exhibits 1 and 2 are deeds. It was conceded by respondents' counsel that, as such, their execution is to be ascertained by the time of their delivery, and not the time of signing. The evidence of A. S. Leslie is that

exhibits 1 and 2 were signed and executed after he had received exhibit 11 in answer to exhibit 10, which was sent on Monday the 20th. The wording of exhibit 10 is consistent only with its having been written before the execution of exhibits 1 and 2 (see 1st and 2nd paragraphs of exhibit 10). The answer, exhibit 11, comes from respondents' manager, is dated April 20th, and takes no exception to the statement. Naylor's diary contains the entries dated the 18th and 20th April. In reading these entries it is admitted that "blank" is to be read Leslie. They are as follows:—On the 18th Leslie requested time to consider the documents, and on 20th that he entered that he attended with the manager at Leslie's place, when further objections were raised, answered, and the matter ultimately completed. The oral evidence of Naylor is that Leslie, having signed the documents on 18th April, refused to deliver them until he had read and examined them, and that he did not deliver them until April 20th. The evidence of Leslie, the documents I have mentioned, and the evidence of Charles Naylor, were the whole evidence as to the execution; and although the evidence of Naylor is inconsistent with part of the evidence of Leslie, with the entry in his own diary, and with the inference that would be drawn from the contents of exhibits 10 and 11, yet on the question of delivery of the deeds, exhibits 1 and 2, he substantially agrees with Leslie. When a judge comes to a conclusion of fact on evidence of such a nature that he, in consequence of its being taken before him, would be in a better position than ourselves to arrive at a just conclusion, we ought not to review his decision. But in all cases the Court of Appeal must look at the evidence, see its nature, and how far, if at all, there is a conflict; and I, on an examination of the evidence, feel reluctantly compelled to differ from His Honour, not only as to the time of execution of exhibits 1 and 2, considered as deeds, but even as to the date on which they were signed. I am satisfied that, although dated the 18th, they were not executed or even signed till Monday the 20th, and after the letters, exhibits 10 and 11, were sent and received. If not a defeasance to exhibit 1, they certainly are a condition to which it was made subject, and, therefore, I am of opinion that, not being registered, the registration of the bill of sale is void. Subsection 1 of sec. 6 of *The Bills of Sale Act of 1891* provides that, together with bill of sale, there shall be filed in the Registry an affidavit truly stating, amongst other things, the time of the execution of the bill of sale. The finding as to the date upon which exhibits 1 and 2 were executed necessarily involves the finding that the affidavit filed with the bill of sale does not truly state the time of execution. I think it right to say that I am satisfied that the misstatement was made *bonâ fide* and without fraud, although the view we take of the facts connected with exhibits 10 and 11, and of the legal effect of these documents, renders it unnecessary to consider whether such an error under such circumstances would render the registration invalid. I agree with the judge that exhibits 1 and 2, if separate documents, were registered in the only way they could be. I am, however, satisfied that they are separate documents. They purport so to be, they are separately executed, each refers to the other as a separate document, and there is nothing in the references contained in exhibit 1 which would not equally apply to any other agreement made between the same parties on that day to secure the debt due from the grantor to the grantee. In like manner there is nothing in exhibit 2 as to a bill of sale which would not equally apply to any bill of sale made on the same day by the same grantor and the same grantee of any property whatever. It is true that the affidavit filed with the copy registered shows that they relate the one to the other, and this has also been shown by other evidence. But in my opinion subsection 2 of section 6 is imperative, and the defeasance must be contained in the body of the bill of sale, that is, evidenced by one and the same execution, or at least so connected by intrinsic evidence that they form only one and the same instrument. The defeasance must, before registra-

tion, be, in fact, written on the same paper or parchment as the bill of sale. It will not do merely to have the registered copies written on the same paper or parchment; and, however made, a meaning may constructively be given to the words "the same paper or parchment." I am of opinion that it cannot be extended to mean the paper on which these two documents were at the time of registration. For the reasons given I have come to the conclusion that the bill of sale was not duly registered on or before the 1st of April, 1892, or at any time. But it was contended that possession being taken under a bill of sale of this nature it became spent and satisfied, *functus officio*, and that, therefore, registration was unnecessary, and that the goods were no longer comprised in it within the meaning of section 7 of *The Bills of Sale Act of 1891*. This certainly was to my mind a startling proposition; no person has ever, before the passing of *The Act of 1891*, suggested that a bill of sale given as a security for the payment of money was *functus officio*, whilst there was still property transferred by it in possession of the grantee, and held by him as security only. The invariable practice of all persons holding under a bill of sale, up to and including the sale of the property so held, has been that the grantee in possession is said to act under the powers given in the bill of sale. Indeed, a mere conveyance of all the property, not expressly stated to have been under and by virtue of the powers contained in the bill of sale, might give rise to great difficulty, and might be held to transfer the interest of the mortgagee only, leaving the chattels still subject to redemption. The case cited in support of the proposition was *Cookson* v. *Swire*, 9 App. Ca, 653, but the facts in that case were such as clearly terminated the transaction between the grantor and the grantee of the goods so far as related to the goods. The grantee had taken possession and sold all the goods comprised in the bill of sale, and had no property in any goods under it, but had, or should be taken to have had, the proceeds of the sale. This case cited is, no doubt, an authority that, as to all goods sold by the respondents before the 1st of April, this bill of sale is *functum officio*, and they were no longer comprised in it; but, as to the goods not sold, they were in the possession of the bank only as a security. The title to them depended on the bill of sale, and they were still comprised in the bill of sale. It was further contended that being in possession of the chattels comprised in the bill of sale was sufficient in some way to change the nature of the bill of sale. The contract passes the property mentioned in a bill of sale, and not the possession. Does the instrument express the contract by which the property passed, is always the great test whether or not the instrument is a bill of sale. See *Mills* v. *Charlesworth*, 1892, A.C. (*per* Lord Halsbury) 239; *Newlove* v. *Shrewsbury*, 21 Q.B.D., 41; *Morris* v. *Delobel Flipo*, 2 Ch. (1892), 355. Possession taken under that, which amounts to a bill of sale, does not convert it into mere evidence of the terms upon which the property is held, and the possession into a pledge. See *Mills* v. *Charlesworth*, 25 Q.B.D., 421. That case, as has been stated, was overruled, but on the ground that the instrument was not a bill of sale. If a bill of sale, the law laid down by the judges on appeal was not questioned—See also *Newlove* v. *Shrewsbury*, 21 Q.B.D., 44 (*per* Lord Esher). The bill of sale when executed was at common law valid and effectual to pass all property comprised therein. The property passes by virtue of the contract, but for reasons which are fully discussed in *Cookson* v. *Swire*, 9 App. Ca. (*per* Lord Blackburn), 664, it was thought necessary to limit the operation of bills of sale in certain cases; and section 21 of our Act, copied in substance from the English Act of 1854, provides that, when not registered within thirty days, a bill of sale shall, if the goods continue in the apparent possession of the grantor, be void against certain persons. Under that Act for the thirty days the common law effect of the bill of sale was not interfered with; it passed the whole property in the goods as against all persons —*Marples* v. *Hartley*, 3 E. & E., 610; *Brignall* v. *Cohen*, 21 W.R., 25. These cases show that,

even after the passing of *The Mercantile Act*, upon the execution of the bill of sale it had the effect as at common law, but at the expiration of thirty days (in England twenty-one), without registration, it became void—in other words, inoperative—against certain persons in respect of such chattels as continued in the apparent possession of the grantor. A bill of sale executed the day before *The Bills of Sale Act of 1891* came into operation would, for thirty days, have full effect as at common law, and, without registration or possession, give to the grantee during the thirty days, as against all the world, the property in the goods. At the expiration of thirty days it would, by virtue of sec. 21 of *The Mercantile Act*, as against certain persons mentioned in sec. 21, become void to all chattels comprised therein which remained in the apparent possession of the grantor; but as against all other persons it would, in respect of these chattels, have the same effect as at common law, and in respect of all other chattels it would, as against all persons, have the same effect as at common law; and that would be its effect till the 1st day of April, 1892, when, if unregistered, it would be affected by section 7 of *The Act of 1891*, and become inoperative as to all chattels comprised therein, whether as between the parties thereto or any other persons. In fact, it would be placed in the same position, with respect to chattels at that date comprised therein, as if it were an instrument executed since the passing of the Act, and not registered. But it has been contended for respondents that such a meaning ought not to be given to the word inoperative, as that would have the effect of revesting the property in the original grantor, which, up to the 1st of April, was vested in the grantee. No doubt that is the effect of such an interpretation, and that, to a certain extent, and in favour of certain persons, has always been held to be the effect of non-compliance with provisions as to registration under *The Mercantile Act*, and to the full extent has been held to be the effect of non-renewal of registration in England. It was contended the word used in the English Statutes and our *Mercantile Act* is "void," and that "inoperative" should not be so construed; and that, whilst a Statute declaring an instrument void might be interpreted as revesting the property comprised therein, a Statute declaring the instrument inoperative should not, as to give it that effect would make it operative. I am unable to follow the reasoning—the instrument in the one case being void, and in the other of no effect. It seems to me to leave the property of the goods in the person who, if the instrument had never been executed, or the contract contained therein never made, would be entitled to the property. Still less can I follow the argument that the word "inoperative" of section 7 should be read as if, after and following upon the words comprised in it, there were inserted the words "not then in possession of the grantee." What is the meaning of the words in sec. 7 "shall become inoperative as to any chattels comprised therein, whether as between the parties to it, or as against any other person."? The form of expression in this Statute has been altered from that used in *The Mercantile Act*, which avoided the instrument only in respect of property in the grantee's possession, and all limitations as to persons against whom the non-registration renders a bill of sale inoperative has been omitted. The words themselves are, to my mind, sufficiently clear to require us to interpret them. They seem to me plain and unambiguous, and to have this effect:—that the property comprised in the bill of sale on the 1st of April, 1892, in default of registration, vests in the person who would have been then entitled thereto if the bill of sale had never been executed. In other words, the bill of sale, with respect to chattels comprised therein on the first day of April, if not then registered, was of no effect, in the very words of sec. 4 as to a bill of sale executed after the Act, which was to have no effect unless and until registration. So after the 1st of April, 1892, a bill of sale executed before the Act was to have no effect unless registered. This introduced no new principle into the law. The old *Bills of Sale Act* contained, as I have pointed out, a provision

of a like nature, differing only in extent. For the reasons given I hold the bill of sale inoperative and void as against the trustee, and I agree with the judgment pronounced by my brother judges in all respects. Being, for the reasons given, satisfied that the bill of sale was not duly registered, and that want of such registration renders it inoperative and void as against the trustee, the only question remaining is the rights of the bank with reference to the set-off. The difficulty to my mind is whether the bank is entitled to set-off, or whether the trustee is entitled to recover the value of the goods. It seems to me that the bank is entitled to hold all they received as the trustees of the sales between 1st April and the insolvency, and are bound only to give credit to Leslie & Co. for the net proceeds resulting from the sale of the goods. As to the balance, they will have the right to rank as ordinary creditors. For these reasons I concur with the judgment of my brother Cooper.

Solicitor for trustee: *A. J. Thynne.*

Solicitors for Royal Bank: *Chambers, Bruce & McNab.*

EASTWOOD *v.* DODSON.

Local Government Act of 1878 (42 Vic., No. 8), ss. 232, 233, 279—Loan from persons other than a bank—Binding council to repay,

E. brought an action against P., a member of the corporation of Mount Morgan, for having borrowed for municipal purposes a sum of money from a person not a banker. The action was tried before Lilley, C.J., and a jury, at Rockhampton. The jury found for the defendant, and judgment was entered accordingly. Documentary evidence showed the council were willing to borrow the money. The money was paid to the defendant, and he paid it into the council's account.

Held, without considering whether an appeal would lie in a penal action of this kind, that, though the verdict was against the weight of evidence, yet there was evidence to go to the jury, and as there was no evidence purporting to bind the municipality to repay, the appeal must be dismissed.

APPEAL from a decision of Lilley, C.J., and a jury, at Rockhampton. The plaintiff claimed £100 by way of penalty from the defendant, a member of the municipal corporation of Mount Morgan, for having borrowed, or attempted to borrow, money for municipal purposes from a person who was not a banker, and attempting to bind the municipality by the transaction.

Dickson, and *MacDonnell*, for the plaintiff.

Feez, and *Lukin*, for defendant.

Feez raised the preliminary objection that there was no appeal. The action was penal. There is no pretence of misdirection or mistake in law. *Chitty's Practice*, 14th edition, 748, and the cases there cited.

Dickson: The penalty should be regarded as liquidated damages. Plaintiff was an aggrieved person, and the practice is the same as in other actions. Sections 232, 233, 279 of *The Local Government Act of 1878* were referred to. The evidence, which was documentary, was overwhelming. There was no doubt the money would be borrowed. The defendant actually got the money and paid it into the account of the municipality. [CHUBB, J.: The question here is not the borrowing, but the binding to pay back. REAL, J.: I could pay £100 into the credit of the municipal council to-morrow, and there would be no obligation on their part to repay it. Unquestionably the council were willing to borrow, and get themselves into the penalty, but very fortunately for them they could not get any one to lend. There is evidence which warranted the jury in arriving at the conclusion they did. It might have been perjury, of course, but then you could have prosecuted for the perjury.] The defendant actually got the money, and paid it into their own account.

REAL, J.: And he may have expected the council would have passed a motion giving him £100 for his services.

CHUBB, J.: But where is the attempting to bind?

COOPER, J.: There is no doubt that the motion is properly worded, but there is no doubt that, although the verdict was against the weight of evidence, there was also evidence to go to the jury. If we thought there was any hope of your succeeding we would give you leave to amend, but

we do not think there is. The motion, apart from the technical objection, is dismissed with costs.

CHUBB, and REAL, JJ., concurred.

Solicitors for plaintiff: *Swanwick & Cotham.*

Solicitors for defendant: *Bernays & Osborne.*

IN CHAMBERS.

HARDING, J. 8th August, 1892.

TRENCHARD *v.* MOCKRIDGE.

Garnishee Order—O. XLI, r. 19—Death of judgment debtor.

Where a judgment debtor dies, and no probate or letters of administration have been granted, the Court will not make a garnishee order against a debtor to the estate of the deceased judgment debtor. If probate had been granted, notice of the application must be given to the executor.

APPLICATION for a garnishee order absolute.

Byrnes, S.G., for execution creditor, moved absolute a garnishee order *nisi*. The judgment debtor was dead, and some of the money had been collected by his solicitors since his death. The order *nisi* was obtained after his death. O. XLI, r. 19; *In re Shephard*, 43 Ch.D., 131; and *Fellows* v. *Thornton*, 14 Q.B.D., 335, were cited.

O'Sullivan for garnishee, *contra*.

HARDING, J.: On the death of a judgment debtor no proceedings can be taken against his estate without some previous application to the Court. If probate or administration has been taken out, the Court would require notice to be given to the executor or administrator. If no probate or administration has been granted, the Court will do nothing. Let the order *nisi* be discharged with costs against the judgment creditor, to be paid to the garnishee.

Solicitor for plaintiff: *Leeper.*

Solicitors for garnishee: *Lilley & O'Sullivan.*

HARDING, J.: 17th October, 1892.

Re PURCELL.

Last examination—Insolvency Act of 1874 (38 Vic., No. 5), s. 164, r. 81.

An insolvent's right to apply to fix a day for his last examination does not arise until the trustee has omitted to do so, and he has one month for that purpose.

APPLICATION to fix date of last examination of an insolvent who had been adjudicated on 22nd September, 1892.

HARDING, J., referred to section 164 and rule 81 under *The Insolvency Act*, and dismissed the application, holding that the insolvent's right to apply for the appointment of a day for him to pass his last examination does not arise until the trustee's omission to do so, and for that purpose the trustee has one month.

Solicitor for insolvent: *Winter.*

HARDING, J. 25th October, 1892.

Re W. H. SHEEHAN.

Practice—Removal of documents—O. LVIIIa, r. 1.

On an application to remove documents produced by a witness in an examination in Court, an affidavit should be made by the applicant stating the circumstances, or by some person with knowledge of the facts.

APPLICATION for leave to take out of Court certain documents produced by A. Cohen upon his examination as a witness in the estate of the insolvent, on 4th December, 1891.

Osborne, for Cohen, applied as above, and referred to O. LVIIIa, r. 1.

McNish (Roberts & Roberts), for the trustee, consented.

HARDING, J.: I think there should be an affidavit fully stating the circumstances and what has been done. This affidavit should be made by the applicant personally. If not, it should be made by some responsible person acquainted of his own knowledge with the facts, and should disclose the reason why the applicant is unable personally to depose.

Solicitors for Cohen: *Bernays & Osborne.*

Solicitors for trustees: *Roberts & Roberts.*

HARDING, J. 7th March, 1892.

Re GORDON'S ESTATE.

Administration—Accounts—Extension of time.

On an application to extend the time for administrator to pass his accounts, evidence should be given as to the state of the beneficiaries, and of their wishes.

APPLICATION to extend the time for twelve months from date for passing accounts.

Osborne, for The Queensland Trustees, Limited, administrator of the estate of A. Gordon, applied as above.

HARDING, J.: Where an application to extend time is made, some evidence should be given as to the state of the beneficiaries, and their wishes. Adjournment will be granted for that purpose.

Solicitors for administrator: *Bernays & Osborne.*

HARDING, J. 18th January, 1893.

HAYLOCK *v.* FROST.

Costs—District Court—Mittimus—55 Vic., No. 33, s. 129.

In an action for an amount exceeding thirty pounds, which was brought in the Supreme Court and remitted to the District Court, the defendant obtained judgment, and costs were allowed on the Supreme Court scale up to the order for mittimus and after the judgment.

APPLICATION for costs.

An action had been brought in the Supreme Court for a sum over thirty pounds, for goods sold and delivered. By consent it was removed to the District Court, and judgment was given for the defendant.

Boland for plaintiff.

Hellicar for defendant.

HARDING, J.: Allow the defendant his costs before removal and after judgment on the Supreme Court scale, as well as the costs of this application.

Solicitors for plaintiff: *Rees R. Jones & Boland.*

Solicitor for defendant: *Hellicar.*

HARDING, J. 18th January, 1893.

NORRIS *v.* HARVEY.

Costs—District Court—Mittimus—55 Vic., No. 33, ss. 126, 127, 129, 137.

Where there are no special circumstances to justify an action being brought in the Supreme Court, which might have been brought in the District Court, and the trial is held in the District Court, costs will be allowed all through on the District Court scale.

APPLICATION for costs.

A writ had been issued in the Supreme Court for the recovery of possession of land, and for mesne profits. By consent the action was remitted to the District Court, where the plaintiff recovered possession and one shilling for mesne profits.

Dickson, for plaintiff, applied for costs on the Supreme Court scale before removal and after judgment on the Supreme Court scale, and for costs on the District Court scale for the trial. *Sections 126, 127, 129, 137* of *The District Courts Act* were referred to, and *Picard* v. *Hine*, 18 L.T. (N.S.), 705; *Morgan & Wurtzburg's Costs*, 578; and *Annual Practice*. The action might have been brought in the Supreme Court or the District Court.

Hamilton, for defendant: The action could have been brought in the District Court.

HARDING, J.: There are no special circumstances to justify this action being brought in the Supreme Court. I therefore allow the plaintiff's costs before and after removal as though a District Court action had been instituted originally in that Court and carried out therein. Costs of this application to be on the District Court scale.

Solicitors for plaintiff: *Morris & Heiner*, agents for *Thompson & Dyball*, Roma.

Solicitor for defendant: *F. G. Hamilton.*

FEBRUARY SITTINGS OF THE FULL COURT.

Re The Extradition Acts, 1870 and 1873, In re CARLO PEDRO.

Extradition—Habeas Corpus—33 & 34 Vict., c. 52, ss. 9, 10, 11—Evidence—Right of prisoner to be heard—Return.

A fugitive convict was brought before a police magistrate in Brisbane for an extradition order. The prisoner was undergoing sentence for a crime committed in Queensland. A warder from New Caledonia demanded his extradition for an offence alleged to have been committed in France, and for which he had been sentenced. The order for committal was made. An application for *habeas corpus* was then granted on the ground that the prisoner was not given a chance of defence, and could have disputed his identity.

Held, on the return to the *habeas corpus*, that the prisoner could not be detained on the conviction under *The Extradition Act*, but must be remanded to custody under the warrant mentioned in the amended return to the writ. The Court can go behind the return and review the police magistrate's decision.

In re Castioni, 1891, 1 Q.B., 149, followed.

Reg. v. *Hustin*, 1 Q.L.J., 16, discussed.

MOTION for the release of a prisoner on a writ of *habeas corpus* directing the keeper of Her Majesty's gaol at Brisbane to bring up the body of Carlo Pedro, a prisoner in custody under a warrant made under *The Extradition Act*. The *habeas corpus* was granted on the grounds (1) that the prisoner had no opportunity of getting legal advice; (2) that he did not answer to the description which had been supplied; (3) that he was not the fugitive criminal whose extradition was demanded by the French authorities.

The prisoner had been arrested in Queensland and sentenced to seven years' imprisonment for robbery. A French warder from New Caledonia applied for the extradition of the prisoner, as being a man who had been sentenced to imprisonment for life for theft and murder in France in 1878. The prisoner was brought up several times at the City Police Court, but the French official was unable to identify him personally, but did so from a written description of certain marks on the body of the prisoner. An affidavit of a medical man, filed for the prisoner, showed there were no such marks as alleged by the French authorities. The police magistrate committed the prisoner. An application for *habeas corpus* was then granted as above. The prisoner was produced, and the return read and referred to the Full Court by Harding, J.

G. W. Power, for the Crown.

HARDING, J.: In England it is usual to refer cases like these to the Secretary of State for the Colonies, and as His Excellency the Governor or his representative here, I have caused communication to be made to the Colonial Secretary, and expect that it will by that means come to His Excellency's knowledge.

Power: The question whether the prisoner had a right to give evidence on his own behalf did not arise. *Clarke on Extradition*, 3rd edition, 214. [REAL, J.: I think the prisoner ought to have had an opportunity of being heard. He had only to bare his breast to show that the marks with which it was sought to prove his identity were not there.] The question of identity in extradition is only necessary in criminal cases, but where extradition of a prisoner under sentence is asked for, it is only necessary to make out a case before magistrates. [REAL, J.: The whole question in my mind is whether by the law of England you can convict a man without his being heard.] The evidence as to identity is very strong. There is no right to go behind the return. *In re Keogh*, 15 V.L.R., 395. [HARDING, J., referred to *In re Castioni*, 1891, 1 Q B., 149.] *Re Guerin*, 58 L.J. (M.C.), 45, foot note; *Reg.* v. *Hustin*, 1 Q.L.J., 16. If the Court has power to send the case back to the magistrates they might try the questions of fact on the affidavits, or send it to a jury.

HARDING, J., delivered the judgment of the Court:—

This is a matter adjourned from my chambers to this Court, in consequence of my having felt myself hampered by a decision of Mr. Justice Pring in the case of *The Queen* v. *Hustin*, 1 Q.L.J., p. 16, in which His Honour decided that, upon a *habeas corpus* the Court, or at least he sitting as the Court, would not go behind the return, the return being of a similar nature to that in this case. Before me in Chambers the prisoner was

represented by a solicitor or legal practitioner, but before this Court he has not been represented, and the Court has given such assistance as it is able to give, and I think, before we finally deliver judgment, although we have done all on his behalf that we could have done if we had been his counsel, that he should be asked if he has anything to say on his own behalf. Prisoner, do you desire to be heard further? [*The Warder:* Prisoner has not got anything to say, your Honour, except that he is not the man.] As it stands now a writ of *habeas corpus* was issued for the production of this prisoner, and for the return of the authority for his detention. He has been produced, and the return has been read. It is under a warrant under *The Extradition Acts*, and also under a warrant by this Court sitting in its criminal jurisdiction. It is only as to the present ground that we have to deal with him. As to the present ground it appears that he was originally brought before the Police Magistrate of North Brisbane, and that the proceedings there have apparently been regular up to a certain point; that is to say, the case against him was entered on, and evidence to convict him was tendered—and possibly sufficient evidence, if uncontradicted—but at this stage, instead of proceeding as in an ordinary inquiry before a magistrate, the prisoner was at once committed. Now there is a maxim of law, "*Audi alteram partem*," which is always upheld, and has been consequently upheld by this Court, which is to the effect that wherever anything in the nature of judicial proceedings are going on, each party in those proceedings must be heard before an adjudication can be made against him. Here he was not in the usual way asked if he had anything to say or any evidence to give, but the conviction was entered at once. That we consider to be wrong, and, consequently, if this was a proceeding for a writ of *certiorari*, the adjudication could have been quashed. We have now to see whether, the proceedings here being of *habeas corpus*, a man can be held under a conviction which would be quashed on another proceeding. The sections of the Act necessary to be referred to are *The Extradition Act, 1870* (33 & 34 Vict., c. 52), sections 9, 10, & 11, "when a fugitive criminal is brought before a police magistrate, the police magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." Section 10 enacts that "in the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as would, according to the law of England, justify the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." The second paragraph states "In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." Before I read section 11 I will say a word or two on that section 10. On that section there are two sets of cases provided for. The one case is that of a fugitive convict; the other is that of a fugitive accused or suspected person. Now, with regard to the fugitive suspected person, consider what are the proceedings in this country with regard to an accused. He is brought before the magistrate for the purpose of committal for trial, and upon the production of evidence which raises such a case as to induce the magistrate to think that he ought to be committed for trial, then the magistrates are to commit him. They have not to weigh the evidence and say whether the man is guilty or not guilty, but to come to the conclusion that such a suspicion is aroused that the justice of the case can only be satisfied by a trial. Upon that case there would arise the legal existence of the crime, and the fact that the party before them was the party who committed the crime. Now, as to each of these there would be an issue—has

such a crime been committed? Is the man that stands in the dock the man that committed that crime? And the jury in the Criminal Court, if the Court were sitting in its criminal jurisdiction, would decide both questions. Secondly, if *primâ facie* evidence were brought before the magistrates that such a crime had been committed, and that the man before them was the man—it does not matter whether there is conflicting evidence or not, for that is beyond the magistrates' power to adjudicate upon—they have got to send it on to the further Court. Those are the cases which are provided for in the first part of section 10, so that the paragraph from *Clarke on Extradition*, which was read, would appear to have very little application to them. And then there is another class of cases which come before the magistrates, more commonly called summary justices, where the magistrate is judge and jury on the case, and decides it, inflicting punishment as the result. In these cases each side must necessarily be heard, and that is what ought to have occurred in this case. But that is not what has occurred in this case. The case before us now is one of a fugitive convict brought before the magistrate for an extradition order, and the magistrate has proceeded as if it were a fugitive accused brought before him. But it is not necessary to say that even in that case the magistrates would be right, for I doubt in my own mind whether even on that he ought not to have heard what there was, because he might have produced evidence so conclusive that there might not be any answer to it. But that need not be dwelt upon. Then we come to the 11th section, which says "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. . . . If a writ of *habeas corpus* is issued after the decision of the Court upon the return to the writ, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered." Now, reading this 11th section, it seems impossible to conceive its meaning to be to give him a right to apply for a *habeas corpus* within fifteen days, unless something can be done on that *habeas corpus*, because, if on that *habeas corpus* a return has to be made, and the magistrate has committed, it would be simple justice to remand him, and the benefit given him by the 11th section would seem to be a nullity; but if, on the other hand something can be done on the return of that *habeas corpus*, then the 11th section is intelligible and the remedy a useful one. Now, on that section, there have been decisions quoted. One of them is in a note to *In re Guerin*, 58 L.J. (M.C.), p. 45, "A prisoner also obtained an order for a *habeas corpus* on the ground that he was a British subject. The Court held that it was competent for them to review the magistrate's decision on that point, and, as the affidavits were of a conflicting character, ordered an issue to be tried before a jury to determine this question. The issue was tried on the 21st December, before Baron Huddleston and a common jury, and the prisoner was ordered to be delivered to the French authorities." And then there is a case of *Re Castioni* in L.R., 1891, 1 Q.B. 149, and there the judges went into this point at considerable length. The judgment of Mr. Justice Denman bears upon the subject, and I quote from p. 157 of that judgment. He went into both of these sections at length. "It was at first contended, in opposition to the application for a *habeas corpus*, that if the magistrate upon this question once made up his mind, the Court had no jurisdiction to deal with it. It appears to me that this proposition cannot be maintained on the very face of the Act itself, which requires by section 11 that the magistrate shall inform the prisoner that he may apply for a *habeas corpus*, and if he is entitled to apply for a *habeas corpus*, I think it follows that this Court must have power to go into the whole matter, and in some cases certainly, if there be fresh evidence, or perhaps upon the same evidence, might take a different view of the matter from that taken by the magistrate." Then Mr. Justice

Hawkins delivered judgment, and at p. 161 says: "Now, the matter has been before the magistrate, and the magistrate acting upon the information and the evidence before him, has come to the conclusion that two things exist. First of all, that there is abundance of evidence to justify him in committing the man to be tried for murder—that is to say, there would have been had his crime been committed in this country; and, secondly, he has come to the conclusion, rightly or wrongly, on which I will have a word or two to say, that the offence was not of a political character, and that, therefore, he ought to be given up. The matter now comes before us—I will not say to review the whole of his decision—but to ask ourselves whether or not, having regard to the whole of the circumstances which are brought to our attention, and which are proved by the depositions and other evidence in the case, we come to the same conclusion as the magistrates, or whether we deliberately arrive at an opposite conclusion. Now, it seems to me to be impossible to say, for the reasons which were stated in the course of the argument, that if the man has a right to move for a *habeas corpus* in order that the case may be reviewed, or for the purpose of getting his discharge, he might not enter into matters which showed he had been guilty of no offence at all; and I should have said that by no means was the matter concluded by the magistrate's decision that he be committed for trial, because the magistrate does not sit, when he is committing for trial, as a magistrate sitting finally to dispose of the case and to give judgment upon it; but he states his opinion that there is a *primâ facie* case, and on that ground he signs his warrant of committal. Again, with reference to the question of whether the magistrate has a right to deal with a man and to deal with his objection of being committed for trial for an extradition crime, I entertain no doubt that the magistrate has no right and no jurisdiction to find finally, as against the prisoner, whether or not he has committed that crime which he is charged with having committed, or whether that crime is one of a political character. I desire to call attention to certain provisions in *The Extradition Act*. First, by section 3, a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, such as treason or other matters; or, if he proves to the satisfaction of the police magistrate that the requisition for his surrender has, in fact, been made with a view to try him for an offence of a political character. These latter words undoubtedly tend to show that Sir Charles Russell was wrong in the view that he took that the *onus* is upon those who seek for the extradition to show that the offence committed is not of a political character, because it must be upon the person who seeks to be discharged on the ground that his surrender is, in fact, asked for with a view to punish him for an offence of a political character; the *onus* of establishing that is upon the alleged criminal himself. Now, sec. 9 and sec. 10 seem to me to have some bearing on the question as to whether or not the offence of which a man is charged is of a political character. First of all, the ninth section enacts that "When a fugitive criminal is brought before a police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England" If he were charged before a magistrate with an indictable offence committed in England, the question of whether or not the offence for which he was indicted were of a political character or not would make no difference. But under this section the magistrate is to deal with him as though the offence charged were an indictable offence committed in England. Then the section goes on to say: "The police magistrate shall not adjudge that the offence is of a political character, but he shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused, or alleged to have been convicted, is an offence of a political character, or is not an extradition crime." It seems to me that the language of this part of the ninth section in itself shows

that the *onus* is on the person who seeks to absolve or exonerate himself from the liability to be handed over to the Government of the territory within which the crime was committed. I find here, in furtherance of what I have to say about this question of the jurisdiction of the magistrate, section 10, which is, to my mind, by no means unimportant: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused has been committed in England, the police magistrate shall commit him to prison; but otherwise shall order him to be discharged." It does not seem to give the magistrate himself the power of dealing with the matter other than this: he is to consider whether the crime is one which, if committed in England, would have made it imperative upon him in discharging his duty to commit the man to prison. If so, he is to commit him to prison, but he is, as I have already shown by section 9, obliged to receive any evidence which may be tendered to show that the crime is of a political character, and that is analogous to the provisions in *Russell Gurney's Act* (30 & 31 Vict., c. 35), which makes it the duty of a magistrate, if a prisoner wishes to call evidence in support of his defence which he intends to set up when he comes to be indicted, to take that evidence and hand it over to the tribunal before whom the prisoner is ultimately to appear. In furtherance of this view that I take, I read the 11th section: "If a police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he shall not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*," which may very well mean this: "I have power to commit you to prison because I am satisfied that you have been guilty of a crime to which the extradition law and treaty apply; you have a right to have any evidence taken on your behalf to show that you are a criminal who ought not to be sent out because your offence, even if committed, was of a political character. I will take the evidence for you. You have fifteen days to make application for your release if you think yet to move for a *habeas corpus*." What follows afterwards shows that it is not the magistrate who is to determine these matters, but it is the Home Secretary who is to determine whether or not ultimately the prisoner is to be sent abroad, because the second part of the 11th section goes on to say: "Upon the expiration of the said fifteen days, or if a writ of *habeas corpus* is issued after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may, in his opinion, be duly authorised to receive the fugitive criminal." These are the provisions of the Act, and they are quite sufficient to satisfy me that the magistrate's decision is by no means binding, either in point of law or in point of fact, and that when these matters come to be considered upon the *habeas corpus*, if the judges have to consider the case, they must consider the case as it is before them at the time the rule is discussed; and I think that, in considering the matter, though we pay respect to the magistrate's view, we are not bound to follow it at the expense of the criminal if, upon the whole state of things before us, we come to the conclusion either that the crime has not been committed, and that there is no *primâ facie* evidence of it, or that the criminal ought not be sent out to his own Government for the purpose of being dealt with by reason of his offence being, though a crime, a crime of a political character." I have no doubt that that is good law. The authorities collected in *Paley on Extraditions*, 7th edit., p. 346, lay it down very clearly that, on a conviction that would be quashed if brought before the Court in another form of proceedings, the prisoner cannot be detained. I am perfectly satisfied that on another

form of proceeding this conviction would not stand, but would be quashed. Consequently, the prisoner cannot be detained on this conviction, but he must be remanded to his present keeping under an amended return of the writ. To make it more clear, he is to be discharged from the warrant issued on the conviction under *The Extradition Act*, and he is to be remanded to custody under the warrant which is mentioned in the amended return to the writ. My brother judges concur, and that is the judgment of the Court.

Solicitor for prisoner: *Price.*

Solicitor for Crown: *J. Howard Gill.*

HANMER *v.* MURRAY AND OTHERS.

Navigation Act (41 Vic., No. 3), s. 81—Port Dues Revision Act of 1882 (46 Vic., No. 12), s. 13—Harbour Regulation No. 95—Slackening speed.

H. was convicted, under *Harbour Regulation 95*, for allowing his vessel to pass another lying at a wharf without slackening speed, and causing a strain on her hawsers. In the absence of evidence to explain the meaning of the word "strain," the Court declined to say the regulation was unreasonable, and upheld the conviction.

Quaere: Is the rule 95 *ultra vires?*

MOTION to quash a conviction by Mr. Murray, P.M., against Captain Hanmer, master of the S.S. Barrabool, for a breach of regulation No. 95, made under *The Navigation Act of 1876*, and *The Port Dues Revision Act of 1882*, on the grounds (1) that regulation 95 was *ultra vires* and unreasonable; (2) that the information disclosed no offence; (3) that the conviction was against the evidence; (4) that there was no evidence that Hanmer was captain of the Barrabool on the 28th October, 1892; (5) that the matter was *res judicata*. The offence complained of was that the Barrabool did not slacken speed when passing the Bulimba Wharf on 28th October, 1892, thereby causing the ship William Fairbairn to strain her hawsers and suffer damage. The appellant was fined five pounds and costs.

Lilley, and *Wilson*, for the appellant, moved the order absolute.

Feez, for Captain Fison, to show cause.

Lilley: Regulation 95 provides that a steamer when passing any wharf alongside which any vessel is moored, or any dredge plant, shall slacken her speed, so as not to cause any strain on the hawsers by which any such vessel or plant is secured. A second paragraph provides that, should any damage arise, the vessel causing such damage shall be liable to make good the damage done in addition to the penalty inflicted. The appellant's contention is that he is not liable to any penalty unless damage is proved. The regulation is *ultra vires* and unreasonable. It is impossible for any vessel to pass another at anchor without causing a certain amount of strain on her hawsers. [COOPER, J.: Is there any scientific evidence on that point?] There was on the first information. The appellant was summoned twice. On the second occasion that evidence was not given. The information disclosed no offence. It is no offence to pass a steamer at any speed provided the strain caused no damage.

There was a dispute between the parties as to whether the matter was *res judicata*, and as to the power of the Court to supplement the depositions by an affidavit of the magistrate. *Ex parte Mair*, 2 S.C.R. (N.S.), 216; and *Re McGrath*; *Wilkinson's Queensland Magistrate*, 771, were cited. An affidavit of what took place was made by the police magistrate and read, but the Court held the evidence insufficient to substantiate such a plea.

HARDING, J.: This was a rule granted by me on a certain rule under the regulations of Ports and Harbours of Queensland, on behalf of William Hanmer, calling upon the Police Magistrate of Brisbane, and Mr. Fison, Shipping Inspector to the Marine Board, to show cause before this Court why an order or conviction made by the said Police Magistrate on 3rd December, 1892, whereby Hanmer was convicted on an alleged breach of the Harbour Regulations, in that, on

28th October, 1892, being master of the steamship when passing a certain wharf, to wit the Bulimba Wharf, in the Port of Brisbane, within the fair way, he did cause a strain on the hawsers. This rule was granted on the ground that the regulation under which the conviction was obtained was *ultra vires* and unreasonable; that the information disclosed no offence; that the conviction was against the evidence and the weight of evidence; that there was no evidence that the said William Hanmer was the master or person commanding the steamer on 28th October, 1892; and that the said Police Magistrate had no jurisdiction to hear the complaint, the subject thereof being *res judicata*. The 5th ground we have already disposed of. The regulation of which the master of the Barrabool is said to have been guilty of a breach is regulation 95. It has been referred to so many times that I think it may be taken as read for the purposes of this judgment. It is said that this rule 95 is *ultra vires*. We are not able to accede to that argument. There has been no evidence or argument before us which enables us to decide that point, and there was none before the Magistrate. We cannot judicially decide the meaning of the word "strain." It evidently does not mean simply a gentle tightening up, and we do not know, and the Police Magistrate did not know, at what moment the tightening of the hawser amounted to a strain. Consequently we are unable to say that the rule is *ultra vires*; and further than that there is no evidence to show that the vessel could not pass without constituting what was, or might have been deemed to be, a strain under this rule. Then it was further argued that the whole of this 95th rule confirmed the evidence. I think that the evidence is applied under the rule so soon as an information charges a person with the fact mentioned in these words: "Any steamers that passes any wharves alongside which any vessel is moored, or any dredge plant are secured, shall slacken their speed so as not to cause any strain on the hawser by which such vessel or plant are secured." That is the offence, and as soon as a man is charged in an information with a breach of that regulation the evidence is applied to the residue of the rule, "and if, through any negligence of this, injury should arise, the master of the said steamer shall be liable to make good the damage in addition to any penalty that may be inflicted upon him for infringement of this regulation." It is merely a penalty as in your ordinary case First of all comes the definition of the crime, and then it goes on "who ever shall be found guilty of this felony or misdemeanour, or whatever it may be, shall be liable to such and such a penalty." I think that is exactly similar to this—on a breach of one of the Port rules an offence is committed, and then the offender becomes liable to the ordinary penalty for infringement of the regulations; and if by reason of the breach of the regulations, in addition to the offence, should any injury arise, then he is as well liable for the damage. Now, that construction of the rule answers all the points upon which the rule was granted. It was granted to test the validity of this rule. So far as the validity of a rule depends upon the question of *ultra vires*, is not sufficiently raised in the case to decide it. But we have thrown out a suggestion that at a future time it may be desirable to raise the question of *ultra vires*. We have thrown out a suggestion which will lead the parties to the correct object of raising that point, but upon the other point on which the whole question entirely hangs, as to whether the rule is within the power of the authorities to make, we hold that it is, and we decide that the justice was right in holding in this case the offence to be committed. Rule discharged with costs.

COOPER and REAL, JJ., concurred.

Solicitors for appellants: *Chambers, Bruce & McNab.*

Solicitor for respondent: *J. Howard Gill*, Crown Solicitor.

GRENNAN *v.* HUTCHINSON.

Local Government Act of 1878 (42 Vic., No. 8), ss. 49, 51–61—Valuation and Rating Act of 1890, ss. 4, 13, sub. 5, 65—Voters' Roll—Qualification—Occupier.

The name of G. appeared on the voters' roll for the municipality of Gympie in respect of a piece of land valued at thirty pounds, of which he was the owner. The land was unoccupied. The value was admitted. At a Revision Court his name was removed from the roll on the ground that he had not the necessary qualification. A rule *nisi* for a *mandamus* to restore his name, and for a *certiorari* to bring up the records of the Revision Court, was discharged. The owner of an unoccupied piece of land within a municipality, valued at thirty pounds, is not entitled to have his name placed on the voters' roll in respect of that qualification.

Semble, no person is entitled to be enrolled, under section 49 of *The Local Government Act of 1878*, in respect of property of a less annual rateable value than one hundred and twenty pounds, in a city or town, unless such person be the occupier thereof.

MOTION to show cause why a writ of *mandamus* should not issue, directed to Abraham Hutchinson, J. L. Mathews, W. Henderson, and others (the chairman and members of the Revision Court), to enter adjournments of a Revision Court at Gympie, and to restore the name of Hugh Grennan to the voters' roll of the municipality of Gympie, and why a writ of *certiorari* should not issue calling upon them and J. G. Kidgell (the municipal clerk) to bring up the voters' roll, records, and all proceedings relating to the sitting of the said Revision Court, held for Gympie on November 30th, 1892. The order *nisi* was granted on the grounds (1) that the said Hugh Grennan, being the owner of land within the municipality valued at £30, was entitled to be enrolled as aforesaid; and (2) that, being the occupier of such land within the meaning of *The Valuation and Rating Act of 1890*, he was entitled to have his name enrolled. It was admitted that the land was worth thirty pounds, and was unoccupied. All the necessary formalities had been complied with. Grennan's name had appeared on the roll on the qualification of a piece of unoccupied land, and had sat as an alderman. At the Revision Court held in November, A. E. Hutchinson and R. Hutchinson objected to his name remaining on the roll on the ground that the land in question did not give him the necessary qualification.

Wilson, for Grennan, moved the order absolute. *Lilley*, for the respondents other than the objectors. *Feez*, for the objectors

Wilson: The land being worth thirty pounds Grennan was entitled to have his name on the roll. He was the owner of an untenanted piece of land. He was the occupier within the meaning of *The Valuation and Rating Act of 1890*. It was said that the land must be worth one hundred and twenty pounds. The sections applicable are sections 49, 51–61 of *The Local Government Act of 1878*; and sections 4, 13, subs 5, 65 of *The Valuation and Rating Act of 1890*. Under *The Act of 1878* the basis of rating was the annual value of land, but since *The Act of 1890* the words "annual value" have no meaning.

Lilley: The question depends on the meaning of "occupation." The term "occupier" has a different meaning in the two Acts. By *The Act of 1878* occupier was a person in actual occupation. By *The Act of 1890* he must have one of two things to enable him to vote. He must be a person who has the right in respect of property of the value of £120, or else he must be an inhabitant occupier. By section 65, sub. 1, of *The Act of 1890* a person must be rated on land to the value of £120, or else he must personally reside on the land. Grennan has not complied with either of these conditions, and is not entitled to have his name on the roll.

Feez, to the same effect.

Wilson in reply: The operation of the proviso to section 49 of *The Act of 1878* is exhausted, as section 65 of *The Act of 1890* applies to the estimate of the number of votes, and not as to whether a person is to have a vote at all. If the proviso has not gone, the word "occupier" must be construed as defined in *The Act of 1890*, every one owning land being an occupier, unless the land is occupied by someone else. The term is synonymous in the two Acts. Where there is

taxation persons are entitled to representation. As to the meaning of "inhabitant," *2nd Institutes*, 702; *Rex* v. *Clapp*, 3 Term. R., 107, at p. 113; *Rex* v. *Tunstead*, *ib.*, 523, were cited. [HARDING, J.: If the word "occupier" has the same meaning in the two Acts, what was the necessity for defining it in different language in the later Act?] To make the meaning clearer.

HARDING, J.: It is unnecessary for us to consider the question further. The rule must be discharged with costs.

COOPER, and REAL, JJ., concurred.

Solicitors for appellant: *Chambers, Bruce & McNab.*

Solicitors for respondents: *Tozer & Conwell.*

Solicitors for objectors: *Bernays & Osborne.*

CUMMING *v.* PINNOCK AND ANOTHER.

Indecent picture—56 Vic., No 20, s. 4—Date of offence—Evidence—Information.

On the trial of an information against C. for an offence under section 4 of *The Indecent Advertisements Act of 1892*, evidence was given of the publication of the "Worker" on the 2nd February. The date of publication complained of in the information was the 28th January, and the information was laid on February 1st.

Held, that the conviction must be quashed. An offence must be proved to have been committed before the date alleged in the information.

MOTION for an order quashing a conviction of Philip Pinnock, P.M, against David A. Cumming, for publishing an indecent picture in a newspaper called the "Worker." He was convicted and fined £50, or one month's imprisonment in default.

Lilley, for appellant; *Dickson*, for P. Pinnock, P.M., and Detective Nethercote, to oppose.

HARDING, J.: If the Government appear for the magistrate and the case fails, the Government have to pay the costs.

Dickson then stated that he appeared for Nethercote.

Lilley: The order *nisi* was granted on the grounds (1) that there was no evidence to support the conviction; (2) that the information disclosed no offence; and (3) that there was no jurisdiction to convict of an offence alleged to have been committed subsequent to the complaint and issue of the summons. The date of the alleged offence was 28th January. The information was laid on 1st February; publication proved on 2nd February.

Dickson was called upon as to the last ground. There was evidence that the defendant was the printer and publisher of the "Worker" on the 28th January. The summons was served on 1st February, and the defendant admitted he was the printer and publisher during January. [REAL, J.: You do not say that the document you saw was a copy of the "Worker" at all. The only evidence of a written document is itself, and you might have been able to prove the publishing of that document, but you do not] The detective went to the office on the 2nd instant and said he saw the defendant at the same place as he saw him the previous day. He asked him for a copy of the "Worker" of January 28th. A copy was given him by the defendant, and he took it away [REAL, J: That does not prove he was the publisher on that day.] He says he was the printer and publisher during January. The date of the offence is immaterial. [REAL, J.: The date in the information is immaterial, but you must prove the date of the offence. If you had proved that he committed the offence before you laid the information, it would have been all right; but here you lay the information and then prove the offence as happening a day afterwards. COOPER, J.: The question is very simple. You asked him whether he was the printer and publisher of the "Worker," but you did not prove that he had published this paper which you say contained the offence. HARDING, J.: It has always been my practice to direct a jury that it was imperative that the offence with which a man was charged should be on a date before the indictment.] There was sufficient evidence for the Bench to come to the conclusion that the defendant was the publisher of the paper on the date in question. If

the offence was proved at any time before the day of trial the date is immaterial.

HARDING, J.: The rule will be made absolute on the third ground, with costs against Nethercote.

COOPER, and REAL, JJ., concurred.

Solicitor for appellant: *A. J. Thynne.*

Solicitor for respondent: *J. Howard Gill*, Crown Solicitor.

EXCISE DEPARTMENT *v.* PEARCE.

Licensing Act (49 Vic., No. 18), s. 109—Married woman—Coercion.

An information for selling liquor without a license, against a married woman, was dismissed on the ground that she being married must be presumed to have acted under the coercion of her husband, who was present and asleep.

Held, that as the presumption of coercion could be rebutted, the magistrates ought to have heard the evidence, and decided whether there was coercion.

SPECIAL case.

The defendant was summoned under section 109 of *The Licensing Act* for selling liquor without a license. Evidence was given that the defendant was a married woman living apart from her husband. At the time of the alleged offence a man was lying asleep in the house, and he was said to be the husband of the defendant. Mr. Murray, P.M., dismissed the case on the ground that the defendant was a married woman living with her husband.

Conlan, for the Excise Department.

Perske and *Fewings*, for defendant.

Conlan: If the decision of the police magistrate is correct *The Licensing Act* will become a dead letter, as most of these sly grog-selling cases take place in brothels. All a woman will have to do is to swear that one of the men present is her husband. The beer was supplied at an oyster supper. No agreement was made about the liquor. [HARDING, J.: The lady might have wished to have a spree at the expense of the gentlemen. If a party of friends arrange to have an oyster supper, and one of them gets the materials, and they afterwards divide the expense, you cannot prosecute him for selling liquor without a license.] He would be the agent of the others. The magistrates did not decide the case. [REAL, J.: You say a bad point of law was raised. Coercion is pleaded on the part of the husband.] Yes. The man was asleep. The woman was managing the house. A man, when asleep, cannot coerce his wife. The doctrine of coercion is inapplicable. *Reg.* v. *Williams*, 10 Mod. R., 63; *Reg.* v. *Cohen*, 11 Cox, 99.

Perske: According to the English authorities there was a presumption of coercion, and no evidence was given in rebuttal. *Reg.* v. *Conolly*, 2 Lew C.C., 29; *In re Ivell*, 2 S.C.R. (N.S.W.), 91, 92. [HARDING, J., referred to 1 *Wharton's Criminal Law*, sections 78, 79.] *Wilkinson's Queensland Magistrate*, 468. If the husband were present and asleep, coercion should be presumed.

HARDING, J.: If your contention is right, in future husbands will be very careful. It will be a great lesson to young people. A husband could not go to sleep in safety.

REAL, J.: If the question which has been raised by the justices is answered in the affirmative, it will be equivalent to saying that a married woman living with her husband cannot be convicted of an offence. That is not the view which I take of it. There might be a presumption of coercion, but that was capable of being rebutted. In the present case the circumstances of the husband and wife have to be taken into consideration, and it was for the magistrate to see whether there was any coercion. My opinion is that the magistrate should not have decided the case merely because the defendant was a married woman, and her husband was present, and sold the liquor, without further considering the evidence upon the fact as to whether she was or was not acting under coercion. The question must therefore be answered in the negative, and the order will be: Allow the appeal, and remit the special case to the justices with the opinion of this Court that, on the question of law stated,

they ought not to have dismissed the case merely because she was a married woman living with her husband, and her husband being present when she sold and delivered the liquor, without considering the further evidence and deciding the question whether she, in fact, acted under the coercion of her husband, his presence at most being only *prima facie* evidence thereof.

HARDING, and COOPER, J.J., concurred.

Solicitor for defendant: *S. S. Pegg.*

Solicitor for Excise Department: *J. Howard Gill*, Crown Solicitor.

NORTHERN SUPREME COURT.

FULL COURT.

March 15th, 1893.

In re JAMES JENNINGS, AN INSOLVENT, *Ex parte* CHARLES CONNOLLY.

Insolvency Act, ss. 4, 15, 114, 117—F. 35—Power of Examining Court to make order—Appeal.

A police magistrate sitting as an Examining Court in Insolvency has no power to make an order for the payment of money, under section 117 of *The Insolvency Act.*

APPEAL from an order of the Police Magistrate at Herberton, sitting there as an "Examining Court in Insolvency," on 28th December, 1892, pursuant to an order of Mr. Acting Justice Noel, dated 15th December. After the appellant had been examined as a witness, the solicitor for the official trustee applied to the Police Magistrate for an order, under section 117 of *The Insolvency Act*, that he should pay £140 9s. to the official trustee; and the Police Magistrate accordingly made the order appealed from.

Macnaughton, for the appellant: The only Court that can make an order under section 117 is either the Supreme Court or a District Court appointed a Court in Insolvency by the Governor-in-Council—*Insolvency Act*, ss. 4, 8, 9, 12, 13. This order, even if good, could not be enforced, not having been made by a judge—section 11. The powers of Examining Courts are limited strictly to what is required for eliciting evidence—ss 77, 114, 115, 116, 216. The depositions when taken are to be forwarded to the Court—section 182—which will then have the materials before it to decide such questions as the liability of the present appellant. [COOPER, J.: Does not Form 35 show it was contemplated that such orders should be made by a police magistrate?] That only shows that orders may be signed by a police magistrate when acting as District Registrar in Insolvency under section 9.

Jameson, for the official trustee: By section 4 "the Court" means "The Supreme Court of Queensland, or other Court for the time being having jurisdiction in insolvency." The Examining Court has, for the time being, jurisdiction in insolvency, therefore the word "Court" may mean "Examining Court," and the Police Magistrate had power to make the order. I rely upon Form 35. The words "in his examination taken this day," signed by the Police Magistrate, show that the order should be made at once. Form 35 is sanctioned by the rules (r. 4), and, by sections 27-28, has the force of law. If the depositions are to be forwarded to the Supreme Court before such an order can be made, these words are meaningless. There is no reason why the trustee should be obliged to come to the Supreme Court to obtain it. [COOPER, J.: There is no means of enforcing such an order except section 11, which only applies to a judge in insolvency.] Section 15 provides for an appeal from the decisions and orders of Examining Courts, and so must be taken to contemplate their having the power to make such orders.

COOPER, J.: It is quite clear from the wording of section 117 of *The Insolvency Act*, and the consideration of the various other provisions dealing with the matter, that a police magistrate sitting as an Examining Court in Insolvency has no power to make such an order as this. The word "Court" in section 117, coming after Examining Court, can only mean the Supreme Court. The appeal therefore is allowed; the

appellant's costs of this proceeding to be paid out of the estate.

Solicitor for appellant: *G. C. Selwyn-Smith*, agent for *R. J. Leeper*, Brisbane.

Solicitor for official trustee: *E. J. Forrest.*

APRIL SITTINGS OF THE FULL COURT.

In re McCROHON, *In re* THE WILL OF JOHN McCROHON, DECEASED.

Infant—Guardian—Religious education—Welfare of children.

A father has no absolute right to direct that his children shall be brought up in any particular religion after his death, but the Court will pay great respect to his wishes. The wishes of the father will be carried out so far as they are not inconsistent with the welfare of the children. A father may by his conduct forfeit his right to dictate in what religion his children are to be brought up, and the Court will decline to act on a wish expressed by him on his deathbed, in contradiction to a consistent course of action in his lifetime, if the welfare of the children would be affected. In matters of religion the Court is absolutely impartial, and pays most regard to the welfare of the children.

Griffith, C.J., and Chubb, J. (Real, J., *dissentiente*), affirmed an order of Harding, J., on further consideration from a judgment of Lilley, C.J., 4 Q.L.J., 202. *Re McGrath* (1893), 1 Ch., 143, approved.

APPEAL from an order of Harding, J., dismissing a summons for change of guardians. The matter came on originally before Lilley, C.J., who required further evidence to establish the authenticity of a document alleged to have been executed by John McCrohon. The facts are set out in the judgments.

HARDING, J.: This case came before the Chief Justice in an application for the removal of the testamentary guardians. His Honour heard it upon affidavits which have been called to my attention, and which I have read. His Honour in his judgment says:—"It would be more satisfactory to me to have further evidence of what took place when it is said the instrument was signed, by whom, when, how, and under what circumstances he was induced or volunteered to sign it. How did such a sudden change of intentions come about? If the seal of confession locks up any secret I do not ask that it be broken. Against the document, when once established, I see nothing in this case that can prevail." I infer that His Honour was not satisfied upon the affidavits which were then before him that that document had been established. On the perusal of these affidavits I agree with His Honour. I do not think, as the case then stood, that the document had been established, and, consequently, as the matter stood then the motion must have been dismissed. The *onus* was clearly upon the parties moving in this case. It is for them to establish that document. Now, the facts shortly are these:—That John McCrohon had, for a considerable period of years, lived a life in which he displayed no religious opinions. Some of his friends say he was an agnostic. At any rate he was a man without a religion. His wife was a Protestant. They had issue of marriage—two children. The wife died; but, whilst she was in her last illness, she used such influence as a wife has with her husband to induce him to desire that his children should be brought up as Protestants. In consequence of this certain relatives, who had come from England about this time, were placed in charge of the children, and continued in charge with the knowledge of the father until his death on August 4th, 1890. On August 3rd, 1890, I think that John McCrohon still continued a man of no religion, or at all events he was not of the Roman Catholic religion. On that night, after eight o'clock, when the doctor was with him, he was in a dying state, and the doctor left him then, never expecting to see him alive again. In these circumstances certain of his relatives, who were Roman Catholics, and the Reverend Father Nolan, as a Roman Catholic priest, had communication with him; but, as a priest, he would have no dealings as a member of the Roman Catholic Church until he had cast from him certain worldly connections which deprived him of the offices of the Roman Catholic Church. There again I am strengthened in my opinion that at that time he

was not a member of the Roman Catholic Church. Then it is said that this document was signed by him:—I, John McCrohon, do hereby express my sincere wish and desire to have my two children, Emily McCrohon and Lillian McCrohon, to be given to my mother, Ann McCrohon, to be brought up by her in the Roman Catholic religion.—John McCrohon (× his mark). That was said to have been signed by the dying man. After this time a certain document, renouncing his membership of the Society of Freemasons, was also said to have been signed. Different accounts of his signing are given, and it is said that when it was ready to be signed he got up and commenced to sign it. Then that was altered, and he signed it with his mark, and so on. At all events it is signed in the presence of two witnesses, James Down and John Fogarty. One of these witnesses is dead, and the other has gone south. Father Nolan says that he has been unable to find him, but he does not say what, if any, steps were taken to find him. Now, who are the persons who spoke as to the circumstances under which this document was signed, if ever it was signed? We have the evidence of the Reverend Father Nolan, Mr. and Mrs. McCroker, and Burke, who were said to have been there; but in all this evidence there is a certain amount of inconsistency, as I read it, and it is all evidence of persons interested in gaining the appointment for the applicant, or of persons of the same religion as the applicant. There are no disinterested witnesses. The first observation I would make in this case is this: that a short time beforehand John McCrohon had made his will, and had appointed William Land and Frederick G. Brown to be guardians of his children, and that Land was his wife's relation, and, as I have said, had charge of the children during McCrohon's lifetime. At that time his intention and expressed desire was that the children should be brought up as Protestants. Now, so far, that is the testamentary appointment of these two gentlemen as the guardians of these children. This document, which is said to have been signed, is a revocation of their appointment, in so much as by it the custody of the children is given to the mother, and directions as to the bringing of them up are given. So that this document signed on that night would, if properly proved, amount to a testamentary appointment of his mother as the guardian, and might or might not have amounted to a revocation of the previous appointment of those two gentlemen as guardians, or it might be the appointment of her as a joint guardian; but so far as it amounted to the appointment of her as guardian, it was a revocation of the will. The document to have that effect, and to have that effect legally, could have been proved as a will, and if it had been proved as a will probably the whole of the contention of the applicant would have been sustained. But no attempt has been made to prove this as a will, and if an attempt had been made to prove that as a will, some evidence would have been required as to its attestation, and in all probability it would not have passed probate until affidavits from certifying witnesses had been produced. So that the mere fact of it not having been propounded for proof is an admission, possibly, that evidence sufficient to entitle it to proof cannot be produced. Then the next step failing that, is: We will use this document as an expression of the deceased's intention after the execution of his will. But the will is an expression of the man's intention, so that, taking it thus far, I do not think that the mother, Ann McCrohon, should be added as guardian or associated in any way in the guardianship of these two infants. We have this document, which amounts only to an expression of opinion as against the will, and it is executed when the man is given up for dying. It was executed at the same time that the document was signed by which he threw off his connection with the Freemasons, and which he is said by the affidavits to have fully understood. At the time that this document was signed, if it ever was signed, George Edward Clarke sees him, and he then describes what took place. He knew him, and called him by name, and then "he requested his sister, who was sitting near the bed, to leave

him, which she did. Whereupon I asked the said John McCrohon what he wished me to do, when he looked at me very earnestly, and speaking with great difficulty, said 'Masonic funeral,' to which I replied 'Do you wish for a Masonic funeral?' And the said John McCrohon answered 'Yes.' The said Thomas Wright was present at this interview, mentioned in paragraph 10, and in answer to a question put by Wright as to whether he wanted a Masonic funeral, the said John McCrohon answered 'Yes.'" So that clearly, as to one of the documents that was signed at the same time that this took place, he could not have known what he signed, or else he must have changed his mind within a very few minutes, or else he would, in all reasonable probability, in the same way, have referred to it. This was when Miss McCrohon was out of the room, and there was no one else there. I think the same observation made with regard to the document relating to Freemasonry applies to this. He knew nothing at all about it; and in my opinion he did not intend that the religion of his children should be changed. On the cases cited by Mr. Rutledge, I do not think, even had I been of opinion that he was desirous that the religion of his children should be changed, that any case has been made for the removal of the testamentary guardians appointed by the will, namely, William Land and Frederick G. Brown, as I do not think that he died in the Roman Catholic religion, or that he desired that his children should be brought up in that religion. I see no reason why his mother, or the Reverend Father Nolan, should be associated in the guardianship. I think on the whole that the applicants have failed to supply that evidence which His Honour thought would be necessary to carry the matter further, and on the whole I am of opinion that the motion must be dismissed. It is the rule that a person making a successful motion gets the costs, and a person making an unsuccessful motion pays the costs. The motion is dismissed with costs.

From this judgment the applicants appealed.

Byrnes, A.G., Rutledge, and *G. W. Power*, for the infants, by their next friend Ann McCrohon. *Feez*, for the testamentary guardians, to oppose.

Byrnes, A.G.: The deceased was married in the Roman Catholic Church; his first child was christened in the Roman Catholic Church. Throughout his lifetime he was a Roman Catholic, though an indifferent one. The evidence is overwhelming that he directed his children to be brought up Roman Catholics. There is no evidence that the children had any settled religious convictions. The deceased was of sound mind, memory, and understanding when he executed the document. It has been impossible to get the attesting witnesses. One is dead and the other has gone away. [GRIFFITH, C.J.: The *onus* is on the appellants to prove the document. If the document was the deliberate wish of the dying man it will prevail. REAL, J.: I have yet to learn that a man by becoming a Freemason declares that his children shall be brought up as Protestants. Freemasonry, like other secret societies, is forbidden by the Roman Catholic Church.] The appeal is based on two grounds: first, the wish of the testator to have the children brought up in his own faith; and, secondly, the right of the father to direct how his children are to be brought up. It was the last wish of the deceased to have his children brought up Roman Catholics. *Hawksworth* v. *Hawksworth*, 6 L.R., Ch. 539.

Feez: The decision of Mr. Justice Harding should be upheld. His Honour found the deceased was not of sound mind when he signed the document. The children are being well-treated by the present guardians. The Court will consider the welfare of the children, and allow them to remain under the sole control of the testamentary guardians. *In re McGrath* (1892), 2 Ch. 496; *Hill* v. *Hill*, 31 L.J., Ch., 505; *Re Violet Nevin* (1891), 2 Ch., 299; *Re O'Malley*, 8 Irish R., Ch., 172; *Re Clark*, 21 Ch.D., 817; *Andrews* v. *Salt*, 8 L.R., Ch., 622. The applicants have waived any rights they had, as they allowed eighteen months to elapse after the death of the father, during which time the infants were being brought up as Protestants. The welfare of the

children is paramount, and religious matters should not be considered. The father forfeited and abandoned his rights to dictate as to the religion of his children by his conduct during his lifetime.

Rutledge, in reply: It is quite consistent with the welfare of the children that another guardian should be added to the testamentary guardians.

C.A.V.

GRIFFITH, C.J., recited the facts up to the death of John McCrohon, father of the children, and delivered judgment: The question to be decided is whether the children are to be taught in the Roman Catholic faith, which was the religion of the father, or whether they should be brought up as Protestants. The case put by the appellants is that the children ought to be brought up in the religion of their father, as a general rule, and that if the rule does not apply that they ought to be brought up in the religion in which their father desired them to be brought up It was contended by the appellants that in either case they were entitled to succeed, on the ground not only that the deceased was a Roman Catholic, but that he expressed a desire that the children should be brought up as Roman Catholics. According to a judgment delivered by Lord Cottenham, in 1840, in *Talbot* v. *Shrewsbury*, 4 My. & Cr., 686, the father has no absolute right, under certain circumstances, to direct the religion of his children after his death, but the Court will pay the greatest attention to an expression of his wishes. In the case of *in re McGrath* (1893), 1 Ch., pp. 143–147, a judgment was delivered on November 11th last, which may be taken to bring the law to the present time. That judgment did not go so far as the contention of the appellants—that the Court was bound to direct that the children should be brought up in the religion of their deceased father, or that the Court was bound absolutely to have regard to the wishes of the deceased father. The effect of that was that the wishes of the father would be carried out so far as they were not inconsistent with the welfare of the children. If the father expressed no wish, the necessary inference would be that he intended his children to be brought up in his own religion, and the case to be decided is whether the case of these infants falls within the general rule, or whether it is one of the exceptions. On this point it was contended that the father, by his conduct during a long course of years previous to his death, had acted in such a manner as to have abdicated, or abandoned, or forfeited his right to have his children brought up in his religious faith. The question has been raised during the argument as to how far it was possible for a father to abandon what was as much a duty as a right. That point was dealt with in the case of *Hill* v. *Hill* (31 L.J., p. 505), and in *Andrews* v. *Salt* (8 L.R., Ch., p. 622). In the case of *Hill* v. *Hill* the father, although a Roman Catholic, had allowed his children to be brought up as Protestants by his wife, who was a Protestant. It was held that a father might, by his conduct during his lifetime, act in such a manner towards his children that the Court, in considering their welfare, would decline to act upon a wish expressed by him on his deathbed in contradiction to a consistent course of action during his lifetime. That opinion was also upheld in the case of *Andrews* v. *Salt*. The question for this Court is to consider whether the father in this case had so acted that the Court would decline compliance with a wish made by him on his deathbed, when such a wish was, in the opinion of the Court, inconsistent with his previous conduct, and contrary to the welfare of the children. It is necessary for the Court to consider whether it is to the interest of the children to give effect to a resumption of authority capricious and cruel to the children. We have to consider whether this case falls within the general rule, or whether it is an exception, and one in which the Court ought not to inferfere to remove the children from the custody into which they had been put by will. As to the religion of the father, Mr. Justice Harding has found that the deceased McCrohon was of no religion—certainly not a Roman Catholic—up to the time of his death. With that finding I am unable to agree. McCrohon

had always been a Roman Catholic. He was married in a Roman Catholic Church, and his first child was baptised in a Roman Catholic Church. There is no evidence as to the baptism of the second child. It is true that the deceased was a Freemason, and being a Freemason is inconsistent with being admitted to the sacraments of the Roman Catholic Church. Before his death, however, and while almost *in extremis* in the hospital, he had become reconciled to the church, and received the last rites of a dying Catholic. That, however, did not make any difference, as the deceased was always a Roman Catholic for the purpose of considering in what religion his children should be brought up, if there were no other circumstances, and no expressed wish. The wishes of the deceased were said to have been finally declared by a document executed on August 3rd, the day before he died, and almost the last act of his life. It is important to consider what was the course of his conduct up to that time for the purpose of deciding whether the case comes within the exceptions to the rule. In doing that we have to refer to the evidence, and I believe that all the witnesses have testified what they really believed was true. Previous to his death the deceased had promised his wife that the children should be brought up as Protestants. During his life he had not taken any part in the religious instruction of the children, and he appeared to have handed them over to Miss Land, who was a Protestant, who seemed to be an intelligent person. She came out from England for the express purpose of taking care of the children, who had probably by this time formed an attachment to her and Mr. Land, and the question is whether, under all these circumstances, the Court should give effect to a sudden change of intention by a man on his deathbed. I have very great doubts as to whether the testator, when he executed that document, understood that what he was doing would be to entirely alter the course of action which he had adopted from the birth of his second child; that it would mean the taking away of the children from the testamentary guardians, whom they knew well, and handing them over to the grandmother, whom they apparently had never seen. The document itself bears evidence on the face of it that the deceased did not know what he was signing. He has attempted to write his name, but his surname is nothing more than a scrawl, and is uncompleted, although it is apparent that the man was not illiterate and wrote a very good hand. But assuming that that document was the last deliberate expression of his intention, then the question arises as to whether the Court ought to allow a sudden change of mind to override a previous course of action for years. That question will have to be answered in considering the time when it came on for decision, and the age of the children when the application was made. The elder child was aged nine, and the other two years younger; and eighteen months had elapsed between the death of the father and the date of the application. In all matters of religion the Court is absolutely impartial. The welfare of the children has to be the primary consideration of the Court, which knows nothing about one religion more than another for the purpose of considering the custody of the children. The Court has simply to decide whether it is desirable, after children have been brought up in the way they have been for a course of years, to take them from the custody of the present guardians and give them to some other guardians. A suggestion has been made that the children might be sent to an orphanage, but in my opinion it is better for them to remain in the custody of their relatives, as at present, than to be handed over to the custody of strangers in an orphanage or elsewhere. On the whole I have come to the conclusion, having regard to the welfare of the children, and considering the conduct of the father for many years previous to his death, together with the fact that since his death the children have remained with the present guardians, that we would be wrong in interfering by changing the custody of the children, or making an order directing them to be brought up in the Roman Catholic faith. We should let things remain as originally settled by

the testator, and not allow an expression of opinion on his deathbed to reverse all that he had previously done. For those reasons I am of opinion that the appeal must fail.

CHUBB, J.: I agree with the judgment of The Chief Justice on the law, and with his findings on the facts of the case.

REAL, J.: I have the misfortune to differ from my brother judges. The first thing we have to ascertain is the principle of the law necessary to this case, and the circumstances which give rise to the very liberal feeling which the law now holds. It is not necessary to this case, but there was a time not far distant when the fact that an attempt was being made to get the children to bring them up in the Roman Catholic faith would have been sufficient to have secured the failure of the appeal. That, however, is not the case in these enlightened times. I entirely agree with the law laid down by the late Chief Justice in this case, and the law laid down in *in re McGrath* appears to me to be entirely consistent with the judgment of the late Chief Justice as to the rights of the father. The applicants have no right in a case of this kind. All they can do is to call the attention of the Court to the wrong that is being committed, and require its assistance for the purpose of carrying out the law. I know of no means whereby the law can be carried out in a mixed community, unless hard and fast rules are laid down. I am utterly incompetent to decide between the merits of the various religions. Any man who believes in any particular religion is incompetent to decide for other people the merits of another religion. I, however, can claim the right to decide for myself, and the law has gone so far as to say that the religion of the children is to be governed by that of the father. Whether that is a wise direction or not it is not necessary to determine. Even on the strength of the decision in *in re McGrath*, I must have held that the children ought to have been brought up in the religion of their father, and that they had the right to be brought up in that religion. The Court will refuse to grant that right only when the father has deprived himself of his right to direct the religious education of children The law requires that the Court s be guided by the opinion of the father. and Court will be so guided unless the father has p mitted a state of things to arise that would it unreasonable for the Court to assist him. first question of importance, to my mind, whether the document which has been prod represents the wishes of the deceased as r the education of his children. That depends two things. Firstly, whether he signed it: secondly, whether he was conscious at the t I am disposed to answer both those questio the affirmative. I am satisfied that the docum has been proved sufficiently to admit it to pr as a will. There is no doubt that the decea was a member of the Roman Catholic Chu He was married in the Roman Catholic Chu and his wife became a Catholic, and his first was christened in the Roman Catholic Ch It has been said that he abhorred the R Catholic religion, but that is hardly the Every act of his life, where he had to take p a religious ceremony, was in a Roman Ca Church; and when he went to the hospita told the doctor that he did not want to be bothe with clergymen, but he next told a warder that did not object to Father Nolan. Every act of t man's life was consistent with his being a Roma Catholic, and when the hand of death was up him he became very anxious to see a priest, a the man would not have been such a hypocrite a his deathbed as to send for a priest, if he had an abhorrence of the Roman Catholic religion. I have come to the conclusion that that document was a deliberate wish on the part of McCrohe and I see nothing which would make me disregar the evidence of Father Nolan. The decision of the judge below, as to the validity of that docu ment, was entirely wrong in my opinion, and tak ing into consideration my view of the law on the subject, I consider it is incumbent on the Court to order that that declaration should be acted upon. Then comes the question whether there were any circumstances in the man's conduct which rem-

dered it improper for the Court to enforce the right of the child to be educated in the religion of his father. I agree with The Chief Justice that it is the law that a child has that right under ordinary circumstances, but I do not agree with him that there is anything in this case which renders it improper for the Court to direct that that rule should be followed. It is true that the children were under the control of the mother, but I cannot conceive how in this case that could be otherwise. They were taught to say their prayers, but there was no evidence that the prayers of the Church of England, which they were taught, would be inconsistent with those of the Roman Catholic Church. Is it to be said that, under those circumstances, the man forfeited his right to have his children brought up in his own religion? His wife, it was said, asked him to allow the children to be brought up as Protestants, but if he was always expressing his abhorrence of the Roman Catholic Church, what did such a request mean? The deceased, however, deliberately expressed his desire, after nearly 24 hours' consideration, to have his children brought up as Catholics. He had done nothing previously to deprive him of his right to direct the religion of his children, and the deliberate wish expressed in that document should prevail. The only evidence as to the deceased having expressed a wish for his children to be educated in the Protestant religion came from his servants, who are Protestants, and are now the testamentary guardians of the infants. I am sorry my brother judges have decided that the appeal should be dismissed, for I feel that no man will be safe unless he happens to have about him servants of the same religion as himself. I dissent from the dismissal of the appeal.

GRIFFITH, C.J.: Considering the position of the testamentary guardians, we consider the costs should follow the result of the appeal.

REAL, J.: I agree with that, especially as costs were asked for.

Appeal dismissed with costs.

Solicitors for appellants: *Thynne & Macartney.*

Solicitors for respondents: *Barnays & Osborne.*

BRITCHER *v.* WILLIAMS AND OTHERS

Brands Act of 1872, sec. 27—Admission of evidence of previous convictions—Practice—Costs.

Two summonses were issued against B., at the Charleville Police Court, for wilfully branding with his registered brand two calves of which he was alleged not to be the rightful owner. By consent both summonses were heard as for one offence only. Evidence was given of previous convictions for illegally branding, but that, as to branding, did not show that B. had himself branded either of the calves, and he was convicted and fined £40 and costs.

Held, on a motion to quash the conviction, that as the evidence of previous convictions had not been objected to before its admission, the conviction was not bad on that ground, but that the conviction must be quashed on the ground that the evidence did not show B. to be guilty of the offence charged. The evidence showed that he was present and caused the branding to be done.

The rule was made absolute, with costs against the Crown.

MOTION for a rule absolute to quash a conviction or order made by John Vivian Williams, Police Magistrate, and John Armstrong, Junior, at the Charleville Police Court, on the 3rd day of February, 1893, on a complaint wherein Herbert Hart was complainant, and Henry Samuel Britcher defendant, on the following grounds:—(1) wrongful admission of evidence of previous convictions; (2) that the evidence did not show the defendant to be guilty of the offence charged; and (3) that there was no evidence to support the conviction.

Bannatyne, for Britcher; *Byrnes*, *A.G.*, and *Feez*, for the convicting magistrates, and (at a later stage) for the Crown, to show cause.

Bannatyne: The evidence showed that the branding was done by a servant of B., assisted by his two sons. Evidence was admitted of previous convictions. In a criminal case, only evidence material to the issue can be allowed—*Reg.* v. *Gibson*, 18 Q.B.D., 537. The Bench allowed the sergeant of police to state that there had been two previous convictions, and that, in the first case, the defendant had been fined £10, and in the second, £20. [GRIFFITH, C.J.: We are all agreed that it was not admissible evidence if it was objected to. HARDING, J.: It has been laid down over and over again that a judge of this

Court must not allow a prisoner to be convicted on improper evidence, and that it is the judge's duty throughout the trial to protect the prisoner from improper evidence. GRIFFITH, C.J.: Can you show that in a case of summary conviction before justices any conviction must fail if evidence is admitted which is inadmissible?] I submit that is so. There is a conflict of evidence as to whether the evidence was objected to. [GRIFFITH, C.J.: Is there any case where a conviction has not been sustained where the objection as to admissibility of evidence is made for the first time after the conviction?] I do not know of any. [GRIFFITH, C.J.: Neither do I. In common law, if you give unsound reasons for the inadmissibility of evidence, and the judge admits it, you cannot afterwards upset the decision on that point.] As to the third objection *Ex parte Hop Sing*, 4 N.S.W., W.N., 59, was cited.

Byrnes, A.G.: The appellant was only nineteen yards away from where the branding took place. He was practically present and employed an innocent person to do an illegal act. The defendant admitted in cross-examination that he had been twice convicted. No objection was taken to the evidence-in-chief at the time. The police magistrate has made an affidavit to that effect.

Bannatyne, in reply, submitted there was no evidence that the appellant was so close to the man actually doing the branding that he was actually engaged in the work himself.

GRIFFITH, C.J.: This is a motion to quash a conviction against Henry Samuel Britcher for illegally branding two calves, on the grounds (1) that evidence of previous convictions was wrongfully admitted; (2) that the evidence did not show the defendant to be guilty of the offence charged; and (3) that there was no evidence to support the conviction. As to the wrongful admission of evidence, affidavits have been filed that no objection was made at the time. I believe that was the case, and on that ground the appeal fails. If justices are to be held responsible for the admission of evidence, and if a conviction is not to hold good when evidence is wrongfully admitted without an objection being made at the time, an intolerable burden will be imposed on magistrates. Another objection is that the offence of which the defendant has been convicted is different from the one with which he has been charged. The defendant was charged with branding, and the evidence clearly showed that he caused and directed the branding to be done. The real question is whether under the circumstances he was properly charged with branding. It is not necessary that a man should actually do the branding himself to become a principal. If he were in the yard and saw the branding done, he is quite as much a principal. No alteration has been made in the charge preferred against the defendant, and on that ground I think the order must be made absolute and the conviction quashed. Costs were asked against the Crown, but I do not think they should be granted.

HARDING, J.: I think the rule should be made absolute and the conviction quashed on the second ground, but I do not express any opinion at present with regard to the first ground of the appeal. The Crown has joined in the fight and supported the complaint, they must bear the penalty and will have to pay the costs.

CHUBB, and REAL, JJ., concurred.

GRIFFITH, C.J.: I hold the opinion that the Crown ought never to pay costs in criminal or quasi-criminal cases; but perhaps I am prejudiced on account of having been so long a Crown Law Officer.

Rule absolute with costs against the Crown.

Solicitors for appellant: *Bonchard & Holland.*

Solicitor for respondent: *J. Howard Gill.*

THE QUEEN *v.* MILLER AND OTHERS.

Licensing Act (49 Vic., No. 18), ss. 41, 49, 57—District Court—Appeal—Married Woman—Certiorari.

An appeal to the District Court from the decision of a Licensing authority lies only in cases where an application is refused on the ground mentioned in section 44, sub. 7 of *The Licensing Act.*

That Act does not prevent a married woman from holding a license, and such license being a mere personal right

is not affected by *The Married Women's Property Act, 1890*. The licensing justices may, if they think it undesirable, refuse to grant a license to a married woman.

MOTION to make absolute an order *nisi* on Granville George Miller, Esquire, District Court Judge, Francis Sealey, and Alice Comley, wife of F. Comley, to show cause why an order in the nature of a *mandamus* should not go against them calling on the said judge to state a special case raising questions of law which arose in the hearing of an appeal before the District Court at Rockhampton, on 19th January last, in which Francis Sealey and Alice Comley were appellants, and the Inspector, under *The Licensing Act of 1885*, respondent, on the grounds (1) that, under section 57 of *The Licensing Act of 1885*, a married woman is not eligible to hold a publican's license; (2) that section 57 of that Act is not repealed by *The Married Women's Property Act, 1890*; (3) that the judge of the District Court had no jurisdiction to hear the appeal, with costs against the respondents other than the judge; also, why a writ of *certiorari* should not issue, directed to the said District Court Judge, Francis Sealey, Alice Comley, and the Registrar of the District Court at Rockhampton, to bring up the proceedings in this case and the certificate of the judge; also, why a writ of *prohibition* should not issue, directed to the said judge, Francis Sealey, and Alice Comley, directing them to desist from proceeding under the said order.

Byrnes, A.G., and *Gore-Jones*, for the prosecution; *Lilley*, for Alice Comley.

The facts appear from the judgment.

Byrnes, A.G., referred to *Reg.* v. *Kelly*, 3 Q.L.J., 153; *District Courts Act*, ss. 150, 152; *Rules (Crown side), O. 7*, r. 6. An appeal lies to the District Court by section 49 of *The Licensing Act of 1885* No proceedings were taken to entitle the appeal, section 41 (2). The judge held he had jurisdiction, and reversed the magistrate's decision. He held that section 57 of the Act was repealed by *The Married Women's Property Act*. He refused to state a special case on the ground of no jurisdiction. *Justices Act*, section 245.

Lilley: Sealey was the licensee, and wished to transfer to Alice Comley. *The Licensing Act*, section 4, defines a "licensee"; section 24, "disqualified persons"; sections 25-28, "the requisites for a license"; section 41 (sub. 7), "objections"; sections 43, 54-56, "transmission on marriage." *Whiteley and Lowe's Licensing Acts*, 30, 31; *Reg.* v. *Nicolson*, 10 V.L.R. (L), 255. A married woman can hold a license since *The Married Women's Property Act*. The judge was right in acting as he did. *Justices Act*, sections 226, 229, 237. *District Courts Act*, section 159, clause 2. The rule should be discharged.

Byrnes, A.G., in reply: A married woman is disqualified. *The Married Women's Property Act* does not affect the question.

GRIFFITH, C.J.: In this case Mrs. Comley joined with one Sealey, the licensee of the Volunteer Arms Hotel, at Rockhampton, in an application for the transfer of the license of the hotel to her The inspector objected to the transfer of the license to Mrs. Comley on the ground that she was a married woman, and therefore incapable of holding a publican's license, and the licensing authority refused the application on that ground. An appeal was made to the District Court, and it was heard by Judge Miller, who was of opinion that a married woman was not disqualified from holding a license, and directed that a license should be issued to Mrs. Comley. An application was made to Judge Miller to state a special case, but he refused, as he held that he had no jurisdiction to do so. It is not necessary in this case to determine whether he had jurisdiction in that respect or not, but I am disposed to think that the wording of section 237 of *The Justices Act* is large enough to cover acts of justices making an order refusing to allow of the transfer of a license. The appeal was made under section 49 of *The Licensing Act of 1885*, which provides a number of grounds for refusing a license. Other grounds are also enumerated in section 41. Before a license can be granted certain conditions in regard

to the buildings are to be complied with; the building has to contain a certain number of rooms, which are to be properly furnished. Then the applicant has to be of good character, but on the whole the grounds of appeal are limited. The question as to whether the conditions prescribed by the Act have been complied with or not is a subject of appeal, as upon that matters of law may arise. The conditions are of such a nature that some act is required to be done either by the applicant or to the premises. The premises have to be in a proper condition, and the applicant has to give notice of intention to make the application, and do other things. In my opinion the conditions referred to are conditions that are to be performed by the doing of some act either by the applicant or to the premises. In this case the objection taken was that the applicant was a married woman. That was not saying that she had failed to comply with any of the conditions, and there was no objection that the applicant had failed to comply with any of the conditions prescribed by the Act. The District Court judge had therefore no jurisdiction to hear the appeal. A good deal has been said on the abstract question as to whether a married woman is qualified to hold a license under the Act or not, and on that question I may say that there is not sufficient material before us to show whether the justices really considered the fitness of Mrs. Comley. On that point, however, it is well known that before the passing of the Act it had been the practice to grant licenses to married women of well known respectability, living apart from their husbands, and under such circumstances as gave them absolute control of the house in respect of which the license was granted, but *The Licensing Act of 1885* does not say in express terms that a married woman is not to have a license granted to her. The question does not arise in this case, though I may say that the inclination of my mind at present is that while it does not either expressly or by implication prohibit the granting of licenses to married women, it indicates pretty plainly what the common sense of licensing benches has acted upon for many years—the undesirableness of granting licenses to married women. I am unable to see what application *The Married Women's Property Act* has to that abstract question of granting licenses to married women. A license under the Act is not in the nature of property. It is a personal right to carry on a certain business, and incidently the right to property might be involved. A license is granted on the personal fitness of the applicant, and that is not a subject for transfer. Section 57 of *The Licensing Act* provides that in the case of a female licensee being married the license will devolve upon the husband as if granted to him originally. That might have been inserted in the original Act in recognition of the fact that a license did not confer any property which was capable of devolving upon the husband, but conferred only a personal right. It is not necessary to pursue the matter further, however, and the Court having come to the conclusion that the District Court judge had no jurisdiction to hear the appeal, the rule will be made absolute for *certiorari*, and the order of Judge Miller granting the license will be quashed without costs.

HARDING, J., and CHUBB, J., concurred.

Solicitors for respondents: *Rees R. Jones* and *Boland*.

Solicitor for prosecution: *J. Howard Gill*, Crown Solicitor.

MAY SITTINGS OF THE FULL COURT.

O'BRIEN *v.* O'BRIEN AND HOLLANDER.

Divorce—Taxation of wife's costs de die in diem—Solicitor and client.

Costs allowed to a wife *de die in diem* should be taxed as between party and party during the trial. *Elfverson* v. *Elfverson*, 4 Q.L.J., 25, varied. *Ottaway* v. *Hamilton*, 3 C.P.D., 393, followed.

SUMMONS for a review of taxation of a wife's costs *de die in diem* referred to the Full Court by Griffith, C.J. The taxing officer allowed them as between solicitor and client, following the practice laid down in *Elfverson* v. *Elfverson*, 4 Q.L.J., 25.

Lilley, for petitioner; *Rutledge*, for respondent.

Lilley: The costs should be taxed as between party and party. The wife is allowed reasonable costs to defend the suit. If further costs are incurred the solicitor is entitled to bring an action against the petitioner to recover at common law what he had expended. *Matrimonial Causes Act*, section 46; *Ottaway* v. *Hamilton*, 3 C.P.D., 393; *Browne on Divorce*, 5th edition, 342; *Stocken* v. *Pattrick*, 29 L.T., 507, were cited.

Rutledge: The taxing officer has observed the rule allowing costs for necessaries. The practice laid down in *Elfverson* v. *Elfverson* has been followed. The costs of this application should be paid by petitioner.

Lilley: They should be made costs in the action or be reserved. It is very hard on us to have to pay them. I will ask to have them fixed now.

HARDING, J., delivered the judgment of the Court: The earlier practice in cases like this in the British courts, up to the time the case of *Ottaway* v. *Hamilton*, 3 C.P.D., 393, was tried, had not been distinctly laid down. That was a case in which the wife was paid her party and party costs, but her solicitor after that had sued the petitioner for extra costs on the ground that the work had been done by him as necessaries supplied to the wife, and that he was not in that respect limited to the statutory rights in the matter. That decision is not absolutely binding upon the Court here, but it should be treated with respect. Although justifying an action by the wife's solicitor against the husband for extra costs as necessaries beyond party and party costs, it cannot be taken as in any sense justifying the taxing officer in granting taxation as between solicitor and client. The Court therefore thinks that, following the practice in the Ecclesiastical Courts, and the practice of the Courts at home, the costs which should be allowed should be *de die in diem*, as between party and party. In the present case we fix the costs of the present application, and of the application in Chambers, at twelve guineas, to be added to the respondent's next bill on taxation.

Solicitors for petitioner: *Lilley & O'Sullivan*.

Solicitors for respondent: *O'Shea & O'Shea*.

Ex parte RILEY. RILEY *v.* O'CARROLL.

Traffic Board—Plying for hire without a license.

R. was convicted for unlawfully plying an omnibus for hire without having a license, and fined £5. He ran an omnibus from the Tramway terminus to his hotel, under an arrangement with the Tramway Company, and contended he was an agent of the company. The passengers by the tram received a ticket without extra fare to travel in the omnibus, and the evidence showed that on a settlement R. received on an average one penny for every passenger.

Held, he was rightly convicted. Real, J., on the construction of the by-laws, thought the fine should be reduced.

MOTION to quash a conviction against the appellant on the prosecution of T. F. O'Carroll, Traffic Inspector, for unlawfully plying an omnibus for hire on the Hamilton Road without having a license. He was fined £5 with costs, to be recovered by levy and distress.

Wilson, for appellant; *Lilley* and *Sydes*, for respondents.

Wilson: There was no plying for hire. Riley ran an omnibus from his hotel to the tram terminus under an arrangement with the Tramway Company.

GRIFFITH, C.J.: The case put before me was that the appellant was an agent of the company. Nothing was said about his being an hotel-keeper.

Lilley: Under the by-laws of the Traffic Board every omnibus or vehicle plying for hire within the radius of the Metropolitan Board has to be licensed, and so has the driver of every such vehicle. The facts here are that the Tramway Company ran omnibuses to Breakfast Creek, and if the passengers desired to go on as far as Hamilton they got a ticket from the tram conductor, and entered the omnibus, which it was admitted was driven by a servant of the appellant. On the 7th March the respondent O'Carroll travelled down to Breakfast Creek by the tram, and at the termination of the journey he obtained a ticket

from the conductor and travelled in the appellant's 'bus down as far as the Nudgee Road. He did not pay any more than the tram fare of threepence. The driver of the omnibus used an ordinary 'bus whistle, and called out in the usual way for passengers. The evidence further showed that on the 9th March there was a settlement between the Tramway Company and the appellant, and he was paid a certain rate for every passenger. [HARDING, J.: The evidence shows that he received on an average one penny for each passenger. Can you imagine a man driving passengers along the road for nothing? He left it to the honour of the Tramway Company.] *Clarke* v. *Stanford*, 6 L.R., Q.B., 357; and *Allan* v. *Tunbridge*, 6 C.P., 481, were cited. Appellant was properly convicted under the by-laws of the Traffic Board, and the magistrates were entitled to inflict a fine of £5 under by-law No. 1, as the penalty was imposed by section 74.

REAL, J.: A penalty is provided in the section under which he was charged. There is no necessity to go to section 74.

Wilson: The appellant was convicted on a misconception as to the term "plying for hire." Plying for hire means soliciting fares, and payment of money by passengers is a necessary ingredient. It means plying regularly. The charge is that he gave O'Carroll a free ride. [REAL, J.: For which he was afterwards paid. He was quite at liberty to give free rides.] *Dennis* v. *Dillon*, 12 *Courier* Reports, was cited. The magistrates imposed a higher penalty than they were entitled to under the by-law. Plying for hire is a different thing to being hired to ply. As to costs, appellant is entitled to succeed on the whole case; or, at any rate, the practice in *Bilby* v. *Hartley*, 4 Q.L.J., 137, should be followed.

REAL, J.: I agree with my brother judges that the appellant was rightly convicted of the offence with which he was charged, but I do not agree with them that he was rightly fined. The appellant has been charged under the first section of the by-law, although the evidence disclosed the fact that he could have been charged under the second. The second section provides for a penalty of £2 in the event of an infringement of the provisions contained in that section; and I hold that sections 1 and 2 must be read together. The question therefore is whether the magistrates could inflict a fine of £5. I think they could not do so. I regret that I have the misfortune to differ with my brother judges on the point, but I cannot agree with them from my conviction. I think the penalty should be reduced to £2, otherwise I think the appeal should be dismissed, as I believe the magistrates have entered a proper conviction

HARDING, J.: I regret to have to differ with my brother Real. According to my interpretation of the by-laws, clauses 1 and 2 define separate and distinct offences. A penalty is provided for a breach of the second section, but there is no penalty for a breach of the first, and it therefore became the duty of the magistrates to impose the fine under the 74th section of the by-laws, which gave them power to inflict a fine of £5 or upwards. I think the defendant was properly convicted, and that the magistrates had power to inflict the fine.

GRIFFITH, C.J.: I agree with Mr. Justice Harding that the appellant has been properly convicted, and that the magistrates had power to inflict a fine of £5. There is no doubt in the mind of the Court that the appellant caused his vehicle to be plied for hire. Although money did not pass between the passengers and the driver, there was an understanding between the Tramway Company and the appellant by which he afterwards received remuneration. The first two clauses of the by-laws, however, appear to have been inartificially framed, and to my mind the second has been taken from some Act of Parliament. I agree with Mr. Justice Harding that there is no fine provided for a breach of the first clause, and that being the case the magistrates were justified in inflicting the fine of £5.

Solicitors for appellant: *Chambers, Bruce & McNab.*

Solicitors for respondent: *Thynne & Macartney.*

Ex parte STRACHAN.

STRACHAN *v.* STRACHAN AND OTHERS.

Licensing Act (49 Vic., No. 18), s. 70—Prohibition Order—Judicial inquiry—Right to be heard in defence—Quashing Order—Justices Act (50 Vic., No. 17), s. 209.

A prohibition order was granted against S., under section 70 of *The Licensing Act*, on an *ex parte* application in accordance with a custom that had obtained for many years.

Held, that the order must be quashed as S. was entitled to be heard in his defence.

Held, also, that the order was within the meaning of section 209 of *The Justices Act*, and could be rescinded by a quashing order.

Smith v. *The Queen*, 3 Ap. Ca., 314, followed.

MOTION for a quashing order against Alice Strachan, Philip Pinnock, P.M., and others. On the 20th April, on the application of Mrs. Strachan, an order was made, under section 70 of *The Licensing Act*, forbidding the serving of intoxicating liquor to Captain Strachan. The application was made *ex parte* before Mr. Pinnock.

MacDonnell, for the appellant, moved the order absolute. No notice was given to the appellant. He should have been called upon to show cause. The practice has been to make these orders *ex parte*, but it has never been objected to. It has been repeatedly held by this Court that a man's liberty cannot be interfered with without hearing him. The order could be made out of spite, and might do great injury.

HARDING, J.: I take it to be one of the strongest principles of British law, and one of the highest privileges Englishmen enjoy under it, that a man cannot be deprived of his liberty of person or reputation unless there has been a judicial inquiry, legal under the law. Under section 70 of *The Licensing Act* a judicial inquiry is necessary. There are a number of matters on which it is necessary that a judicial inquiry should be held by the magistrate before he can make the order. He cannot make the order unless he is satisfied of certain things, as for instance—(1) Did he by the excessive use of liquor misspend, waste, or lessen his estate? or (2) did he injure or endanger his health, or the health of any other person? Those are matters upon which the magistrate must be satisfied; and in order to be satisfied he must hold a judicial inquiry. A result of that judicial inquiry might be to prejudice in the present instance the liberty of John Strachan; therefore I think he was entitled to be present. For that no further authority is needed than the case of *Smith* v. *The Queen*, 3 Ap. Ca., 314. The latest decisions which have been given on the matter are in the cases of clubs. It was held there that wherever there had been a proceeding by a club to oust a member they must hold a judicial inquiry; and the party who was to be ousted must have an opportunity of being heard. It seems to me that Strachan had a right to be in Court and to be heard. Whether or not he could give evidence is another matter, but under the new *Criminal Law Amendment Act* I suppose he could, and he could also have produced evidence to show that he was not open to the charge of the excessive use of liquor. I cannot think that because a course of practice has been followed by an inferior Court for a number of years such course should be followed by the Full Court. The practice has not been recognised by this Court, the highest Court of Appeal in the country, and were it so a bad law promulgated by an inferior Court would become the law of the country. I think the appeal should be upheld. On the question as to whether there should be a prohibition or a quashing order, I think a quashing order would apply, as the order which has been made is an "order" within the meaning of section 209 of *The Justices Act*. The applicant in the case being the man's wife the appellant cannot ask for costs, unless a provision in one of the new fangled Acts as to a woman's separate estate applies.

REAL, J.: I concur for the same reasons.

GRIFFITH, C.J.: I do not dissent from the decision; but I confess that there is one point which I should have liked to hear argued. I do not for a moment doubt the general principles enunciated by my brother Harding, that ordinarily both sides must be heard before an order is made against any person. The proposition, I appre-

hend, was correctly stated in *Bonaker* v. *Evans*, 16 Q.B. (*Paley on Summary Convictions*, p 93). Mr. Baron Parke, in delivering a judgment of the Court of Exchequer Chamber said: "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the Legislature has expressiy or impliedly given an authority to act without that necessary preliminary." The doubt I entertain is whether the Legislature has not expressly or impliedly given authority to move the order in the present case without hearing the party against whom it was made. My doubt arises on this ground. *The Licensing Act* has been in force in Queensland since 1885, and the section in question has been taken from an earlier Act, the origin of which I do not know. If my memory serves me correctly it was in force before the separation of Queensland from New South Wales. It had been the practice of the Courts in New South Wales to entertain applications of this nature *ex parte*, and the same practice has been followed in Queensland. I think that when *The Licensing Act* was passed in 1885 the Legislature must have been aware of the practice which had been followed for a number of years; but they did not alter the form of words contained in the previous Act, or express a desire that the practice should be altered. Therefore I think there are important grounds for thinking that the Legislature "expressly or impliedly gave an authority to act without the necessary preliminary." Moreover the proceeding seems to me to be analogous to the proceedings in an application for sureties of the peace, or for good behaviour. Those applications are *ex parte*. Further than that, it would benefit the party against whom the order was sought if the application was made *ex parte*, for under those circumstances there is no doubt that it could be rescinded. If he were heard, however, I do not know any means by which the order could be rescinded. But if the Legislature had intended it to be made *ex parte* they should have said so. On the whole question I do not dissent from the decision of my brother judges

The quashing order was made absolute without costs.

Solicitors for appellant: *Unmack & Fox.*

QUEENSLAND TRUSTEES, LIMITED *v.* REGISTRAR OF TITLES.

Real Property Act of 1861 (25 Vic., No. 14), ss. 11, 19, 21, 24, 42, 126, 127, 128—Assurance fund—Person deprived of land—Caveat—Misfeasance—Transmission—Mortgage with further advances.

James Cranley, by his alleged last will, devised all his realty to his daughter, Mrs. Fahy. Probate of the said will was granted on 21st August, 1890. On 22nd September, 1890, Mrs. Fahy, as sole devisee under the will, applied to the Real Property Office to be registered as proprietor of the whole of the interest of the testator in the said lands free from encumbrance. The Registrar of Titles caused notice of such application for transmission to be advertised, and appointed the 25th November as the day upon or after which he should proceed to register the transmission, unless in the interval a caveat forbidding him so to do should be received. On 26th November a caveat in form "B," under *The Real Property Act of 1861*, was tendered by the solicitors of Patrick Cranley, a son of the testator, forbidding the registration by the transmission. The Registrar of Titles declined to receive the caveat on the ground that it was lodged too late, and on the 2nd December, 1890, an entry was made in the Real Property Transfer Office transmitting the lands to Mrs. Fahy.

On the 24th December, 1890, the said Patrick Cranley lodged a caveat in form "K," under the said Act, forbidding any dealings with the said land. This caveat was duly registered on December 30th, 1890. Meantime a bill of mortgage for a certain sum and further advances, in favour of the Queensland National Bank, made by Mrs. Fahy, had been lodged for registration on the 13th December, 1890. The Bank were *bona fide* mortgagees for value of the said lands without notice. On 7th January, 1891, Patrick Cranley commenced an action in the Supreme Court for revocation of the will of James Cranley, and on 3rd June, 1892, probate of the will was revoked. On 19th July, 1892, letters of administration of the real and personal estate of James Cranley were granted to The Queensland Trustees, Limited. On 26th July, 1892, the Bank gave notice to the plaintiff herein of their intention to enforce their power of sale under the said bill of mortgage. Mrs. Fahy having made default in payment of the principal and

interest secured by the said mortgage, the plaintiff as administrator as aforesaid commenced an action against Mrs Fahy for being deprived of the said lands. Judgment was signed against her for £1,460, the value of the land, and costs to be taxed. Execution was levied. Mrs. Fahy was then adjudicated insolvent on the petition of the plaintiff, and there were no assets in her estate. A writ was issued by the plaintiff on 17th November, 1892, against the Registrar of Titles as nominal defendant, for the recovery of £1,520 14s. damages against the Assurance Fund under *The Real Property Acts*, being the amount awarded to the plaintiff as administrator of the said James Cranley against Mrs. Fahy, for wrongfully depriving the plaintiff of the lands aforesaid by improperly obtaining in the Register Books of the Registrar of Titles an entry of transmission to her of the interest of the said James Cranley in the said land. The plaintiff also claimed damages against the Registrar of Titles for the omission, mistake, or misfeasance of the Registrar of Titles or his officers in refusing to receive or register a caveat against the entry of such transmission. The defendant demurred to the Statement of Claim on the ground that it did not appear that the plaintiff had suffered any loss or damage through any omission, mistake, or misfeasance of the defendant, or any of his officers or clerks.

Held, that the plaintiff had been deprived of an interest in land, and Mrs. Fahy having been adjudicated insolvent, the plaintiff was entitled to be indemnified from the Assurance Fund to the extent of the amount necessary to redeem the mortgage from the Queensland National Bank.

There are two remedies against the Assurance Fund, and it is not necessary to prove misfeasance on the part of the Registrar of Titles to succeed under ss. 126, 127.

Property registered under *The Real Property Acts* in the name of a married woman before the passing of *The Married Women's Property Act, 1890*, is, since the commencement of that Act, her separate property.

The Registrar of Titles is not liable for misfeasance in refusing to receive a caveat lodged after the expiration of the time prescribed by notice, but before the issue of a certificate.

Semble: He should, however, pay attention to such an application and make inquiries, in order to protect the Assurance Fund.

Rutu Pehi v. *Davy*, 9 N.Z.L.R., 134, followed.

Per REAL, J.: The mere lodging of a caveat is not notice. A caveat does not affect dealing with property outside the Real Property Office. Where there has been no notice it is unnecessary for a registered mortgagee with further advances to search the register before making a fresh advance.

DEMURRER.

This was an action by the plaintiff, as administrator of the lands and goods of the late James Cranley, against the Registrar of Titles as nominal defendant, to recover damages against the Assurance Fund, under *The Real Property Acts*, for being deprived of certain lands belonging to the said James Cranley, by an entry of transmission being made in the books of the Registrar of Titles to Margaret Fahy, the sole devisee under an alleged will of the said James Cranley, probate of which was revoked (4 Q.L.J., 197), and letters of administration subsequently granted to the plaintiff, and for damages for the omission, mistake, or misfeasance of the defendant or his officers in refusing to accept a caveat forbidding such transmission.

The facts appear sufficiently from the head note hereto and judgment.

Byrnes, A.G., and *G. R. Byrne*, for the Registrar of Titles, in support of the demurrer; *Lilley* and *Scott*, for the plaintiff.

Byrne: The plaintiff has not been deprived of any interest in land. There is no allegation in the Statement of Claim as to a return of *nulla bona*. The caveat was rightly rejected. Section 33 of *The Act of 1877* extends the provisions of section 19 of *The Act of 1861* to transmission. The word "shall" is imperative. The "interval" refers to the time mentioned in the notice. Probate of the will was produced. [REAL, J.: Probate in common form is nothing. The Registrar of Titles could have called on Mrs. Fahy to prove the will in solemn form. He is a nominal defendant under section 126, but a substantive one under section 128. HARDING, J.: Should not the bank be represented?] *Lilley*: No. We ask no relief against them. They are *bona fide* mortgagees and absolutely protected under the proviso to section 126.] Under section 11 the Registrar of Titles may examine witnesses. He was justified in refusing to delay entering transmission. *Ex parte Bowman*, 7 V.L.R. (L.), 314. A caveat in form "K" could have been lodged. The time is limited by section 24. [REAL, J.: Section 21 must be set up by way of defence in any case.] Sections 96-98 deal with caveats in form "K." As to section 128, there is no mis-

feasance. On section 126 there is no evidence of fraud. [GRIFFITH, C.J.: That is unnecessary.] *Oakden* v. *Gibbs*, 8 V.L.R. (L.), 387. There was *laches* on the part of Patrick Cranley. [GRIFFITH, C.J.: He is not suing now; he did not represent the other next-of-kin.] All the necessary remedies have not been taken against Mrs Fahy.

Lilley: Relief is claimed on two grounds—(1) under sections 126, 127; (2) under section 128. As to the second ground, it was unnecessary to advertise notices of transmission till *The Amending Act of 1877*. The words "upon or after the expiration of which," in section 19, mean between the publication of the notice and completion of the act by the Registrar of Titles. The instrument is not effectual till registration, but, when registered, operates from the time of lodging the application. The Registrar is not a mere machine. He must exercise a discretion. *Manning* v. *Commissioner of Titles*, 15 Ap. Ca., 195. He would have been protected by the Court if he had suspended the granting of the certificate. *Re Nelson Brothers*, 5 N.Z.L.R., 111. The advertisements might have produced information. Section 21 is not applicable. No caveat was lodged by the Registrar of Titles, or at the instance of Mrs. Fahy. [GRIFFITH, C.J.: The grounds for lodging a caveat must be stated in form "B" in the schedule. HARDING, J.: Any number of caveats could be tendered after the time had expired, and the application put off indefinitely.] Application could be made to the Court to set them aside. The Registrar of Titles was liable for misfeasance. As to the first ground, the plaintiff was deprived of an interest in land under section 126. *Anderson* v. *Davy*, 1 N.Z.R., 302, is very similar to this case. In *Rutu Peehi* v. *Davy*, 9 N.Z.R., 134, it was held that the section corresponding to section 128 of our Act did not control the sections corresponding to sections 126 and 127, and that it was not necessary to prove misfeasance on the part of the Registrar. The plaintiff has done all that is necessary under section 127. Mrs. Fahy has been adjudicated insolvent as to her separate estate. There are no assets in the estate. [HARDING, J.: There is the equity of redemption.] A return of *nulla bona* is unnecessary. *Hassett* v. *Colonial Bank*, 7 V.L.R. (L.), 380; *Fotheringham* v. *Archer*, 5 W.W. & A'B., 95; and *Gibbs* v. *Messer* (1891), A.C. 248, were cited.

GRIFITH, C.J.: This is an action brought by the plaintiff as administrator of the estate of James Cranley, deceased, against the Registrar of Titles. It is, I believe, the first action of the kind brought in the colony. The case is put on two grounds:—first, simply that the plaintiff, as the administrator of James Cranley, has been deprived of certain lands; and, secondly, on the ground that the Registrar of Titles was guilty of an omission or misfeasance in refusing to receive a caveat lodged after the time limited by him for the receipt of caveats against the entry of transmission to Margaret Fahy. James Cranley died, as we know, intestate in 1890, but he has left behind him a document in the form of a will—which was proved in common form—by which all his property was devised to Margaret Fahy for her own benefit. She proved that will in common form, and then made application to the Registrar of Titles to have transmission of the land entered up to her. The Registrar of Titles fixed the time up to which caveats were to be received, and fixed that time at a month. On the day after the expiration of the month, Patrick Cranley, one of the beneficiaries, and one of the next-of-kin, tendered a caveat, but the Registrar thought he was not bound to receive it, and entered up transmission to her. It is suggested that his refusal to receive and enter the caveat, although it was after the date prescribed, was before he entered up transmission, and was a misfeasance or omission on his part. Subsequently an action was brought by Patrick Cranley against Margaret Fahy for the revocation of the will. That will was accordingly revoked, and subsequently administration was granted to the present plaintiff. The facts shortly are that the Registrar of Titles entered the transmission to the devisee; subsequently the probate was revoked; and it turned out that the deceased died intestate The plaintiff then brought an action against Mrs.

Fahy for damages, and recovered on that £1,460. They then issued execution to that amount, and afterwards made her insolvent. On the question of the subsidiary cause of action—the misfeasance or omission—I do not think it is necessary to decide anything. Many questions have been mooted—for instance, whether the Registrar is bound to receive a caveat after the time limited by him, or whether he is bound at the expiration of that time to enter up transmission then, though he may infer that the applicant is not entitled to transmission. That seems pretty well indicated in *Manning* v. *Commissioner of Titles* by the Privy Council. The Registrar of Titles is not bound, and has not to enter up transmission to a person whom he believes not entitled to transmission. He will not be guilty of misfeasance if he refuses to receive a caveat tendered after the proper time, but I do not think it necessary to express any definite opinion on that point. The other and more substantial ground of the plaintiffs is that the plaintiffs have been deprived of the land by reason of the issue of the certificate of title. Now, first of all, have they been deprived of the title? If the certificate of title had not been issued to Margaret Fahy, the title would have stood in the name of James Cranley until transmission had been granted to the plaintiffs. They would have applied, and transmission would have been entered up to them as a matter of course, but in consequence of it being issued to Margaret Fahy it could not be issued to them. It does not follow that they have been deprived of the land. In the meantime Margaret Fahy mortgaged the land for £1,000 to the Queensland National Bank, who took the mortgage *bona fide* for a valuable consideration. So there is no doubt that the plaintiffs have been deprived so far as the bank is concerned; and there can be no doubt that they were deprived in consequence of the issue of a certificate of title to another person—Margaret Fahy. The Act provides in section 126 that "any person deprived of any land, or of any estate or interest in land, in consequence of fraud, or in consequence of the issue of a certificate of title to any other person, or in consequence of any entry in the register book, may bring and prosecute an action at law in the Supreme Court for the recovery of damages against the person who derived benefit by the issue of such certificate of title, or by such entry." The plaintiffs have done so, and they have recovered nothing. Then section 127 provides "in case the person against whom such action for damages is directed to be brought shall be dead, or shall have been adjudged insolvent, then, in such case, it shall be lawful to bring an action for damages against the Registrar-General, as nominal defendant, for the purposes of recovering the amount of the said damages and costs against the Assurance Fund hereinbefore described." That is one kind of relief that is given. The section also goes on to say "and, in any such cases, and also in any case in which damages may be awarded in any action against the person deriving benefit in consequence of the issue of any certificate of title, or otherwise as aforesaid, and the Sheriff shall make a return of *nulla bona*, or shall certify that the full amount with costs awarded cannot be recovered from such person, the Treasurer of the Colony, upon the receipt of a certificate of a judge of the Supreme Court, and of a warrant under the hand of the Governor, as hereinafter provided, shall pay the amount of such damages and costs, or the unrecovered balance thereof, as the case may be, and shall charge the same to the account of the Assurance Fund." Now, the plaintiffs have not proceeded in this case under the latter part of section 127. Although they have brought an action against Mrs. Fahy they have elected to stand on the first part of section 127 and say she has been adjudicated insolvent. I was at first rather inclined to think that the two parts of the section were mutually exclusive, and that a person taking advantage of the second part could not afterwards come and claim the benefit of the first part of the section, but that conclusion was not a necessary one, and might lead to very great injustice. The plaintiffs in this case bring themselves within the literal words of the first part of

the section—the person against whom the action was brought has been adjudicated insolvent. In the action brought against her the damages sought seem to have been the whole value of the land, although it seems pretty clear that they could get the difference between the value of the land and the amount due to the Queensland National Bank. The question has been mooted whether a married woman could be properly adjudicated insolvent, and a rather curious point arises there. The property, if devised at all, became her separate property. Now, an action can only be brought against a married woman in respect of her separate property. We know now that she had it not rightly, but that, by means of the supposed will, obtained the transmission of it, and having it entered up to her became the registered proprietor, and under those circumstances that land was her separate property so long as it remained in her name on the register. Under those circumstances I think it would be a very forced construction if we were to allow ourselves to be guided on subsequent light, and finding that she ought never to have had it at all, hold that the adjudication, which evidently was made against her in respect of that, was improperly made. That would be in fact to deny justice. I think, therefore, she must be considered properly adjudged insolvent, and that the conditions of the first part of the section have been complied with, and, consequently, that the plaintiffs were entitled to bring and maintain this action as against the Registrar of Titles, as nominal defendant, for the purpose of recovering the amount of the damages and costs against the Assurance Fund. What amount of damages they are entitled to recover is not submitted to us, and it is not therefore necessary to express any opinion on the subject, but it has been suggested in the course of the argument that the real ground for the loss is the amount of the Queensland National Bank's claim upon it, and that that suggestion might possibly save the expense of further litigation. Of course, only one action can be brought against the Registrar of Titles. It was also pointed out that, as they have elected to proceed under the first part of the section, they cannot claim costs of an action which would have been an essential part of their claim under the second part, but was no part of their claim under the first part. On the whole I think the demurrer must be over-ruled, and with costs accordingly.

HARDING, J.: I am of the same opinion.

REAL, J.: I am of the same opinion.

The action came on for trial before Real, J., on 20th July. The plaintiffs, after the intimation of the Full Court, abandoned their action for negligence through the rejection of the first caveat. The value of the land, and the amounts advanced by the Queensland National Bank from time to time were admitted, and the fact that the Bank had no notice of the caveat in form "K." Mrs. Fahy was still the registered proprietor, and no entry had been made on the register of the order for revocation of probate.

Lilley, and *Scott*, for plaintiff.

Byrnes, *A.G.*, and *Byrne*, for defendant.

Lilley moved for judgment for £1,074 16s. 8d., the amount admitted to be due to the Bank on the security of the mortgage given by Mrs. Fahy.

Byrnes, *A G.*: The defendant is the custodian of a public trust fund. He has no desire to evade liability. The only question is the measure of damages. [REAL, J.: I thought the Full Court decided that the sum should be the amount of indebtedness to the Bank. I understood from counsel at the time that there would be no difficulty in getting the land from the Bank. Any sum over the amount of the indebtedness would come to the trustee for distribution as a dividend. The land is admitted to be worth more than the amount advanced on it. If it was mortgaged for more than it was worth, you might possibly get a reduction.] Then there is the question of the caveat lodged by Patrick Cranley. [REAL, J.: That has nothing to do with this. The plaintiff is a different person altogether. If Patrick Cranley were here as an individual, his rights might be affected.] At the time the second caveat ("K") was registered, only £400 was advanced. The caveat is a protection of rights of all parties

against subsequent dealings with the land. *Re Wildash*, 1 Q.L.R., pt. II, 47. The Bank had no notice—unless the caveat was notice. [REAL, J.: And they are not here. A caveat is one of the few things that can be registered without producing the certificate of title. I hold that a caveat is not notice. In my opinion the lodging of a caveat does not affect anything done outside the office. A man cannot be affected by anything done behind his back unless he has had notice. It protects any act within the Registrar's office, but not outside, unless there is something in the Act. Otherwise, in the case of a mortgage with further advances, it would be necessary to go and search for a caveat before every further advance was made.] Further, in the action brought by Patrick Cranley, all persons interested were made parties. They ought to have given notice to the Bank. The damages should be the amount advanced at the date that action was started. [REAL, J.: Is a *lis pendens* notice to everybody? After notice of the caveat the Bank would have advanced at their peril. Registration protects them. Personally, if the property had wholly gone, I would have been inclined to assess the damages at the value of the land. The Assurance Fund is an indemnity, and the Government are in the position of insurers, who undertake, in consideration of certain payments, to make good any loss. It has been raised from contributions by property holders, who find it more convenient to contribute than have a doubtful title.] There is no entry made in the register book of the judgment for revocation. Payment cannot cure the deprivation. A second action might be brought against the fund.

REAL, J.: They must get their damages once and for all. All you have to do is to make compensation. There must be judgment for the plaintiffs for £1,074 16s. 8d., and costs.

Solicitors for plaintiff: *Lilley & O'Sullivan.*

Solicitor for defendant: *J. Howard Gill*, Crown Solicitor.

IN CHAMBERS.

GRIFFITH, C.J. 20th March, 1893.

Re WALKER. *Ex parte* MCGUIGAN.

Bills of Sale Act of 1891, ss. 8, 9, 17—Renewal of registration—Extension of time for filing affidavit—Form of order.

SUMMONS by Robert McGuigan for an order extending the time for filing the affidavit of renewal of the registration of a bill of sale made between John Walker, of Maryborough, in the Colony of Queensland, engineer, of the one part, and Robert McGuigan, of "The Island," farm manager, registered as No. 308 of 1892.

O'Sullivan applied for the time of filing to be extended till 22nd March, 1893, read an affidavit of the mortgagee to the effect that delay had been caused by floods, and referred to section 17.

GRIFFITH, C.J.: This order is to be taken as the form of order in similar matters in my chambers "Upon hearing the solicitors, and upon reading the affidavits, &c, and being satisfied that the omission to renew the registration of the said bill of sale, by filing the prescribed affidavit on or before the 19th day of February, 1893, was accidental and due to inadvertence, I do order that the time for filing the said affidavit be extended until the 22nd day of March, 1893, and that, upon filing the said affidavit on or before that date, the omission to renew such registration shall be deemed to be rectified."

Solicitors for applicant: *Lilley & O'Sullivan.*

HARDING, J.: 12th May, 1893.

O'FLYNN *v.* MUNICIPALITY OF NORMANTON.

Jurisdiction—Special case—Northern Supreme Court.

A special case stated by justices at Normanton by way of appeal from their decision on the question of the rating of land should be heard before the Northern Supreme Court.

SPECIAL case stated by justices at Normanton. Property belonging to the Roman Catholic Church at Normanton was rated, and, on appeal to justices, declared not liable to rates. A case was then

stated and set down for argument before Harding, J.

Byrnes, A.G., and *Conlan*, for the respondent; *Lilley*, for the Municipality, the appellant.

Byrnes, A.G., raised the preliminary objection that the appeal should have been taken to the Northern Court. *Rodda* v. *Allen*, 2 Q.L.J., 108; *Harries* v. *Martin*, 4 Q.L.J., 44; *Justices Act*, ss. 233, 236; *Supreme Court Act of 1889*, ss. 11, 16; *Regulæ Generales, 2nd September, 1890.*

HARDING, J., upheld the objection, ordered the special case to be transferred to the Northern Court, and ordered the appellant to pay the respondent's costs occasioned by the matter being transferred to Brisbane.

Solicitors for appellant: *Macdonald-Paterson, Fitzgerald & Hawthorne.*

Solicitors for respondent: *Thynne & Macartney.*

GRIFFITH, C.J. 22nd May, 1893.

HELION *v.* MCGROARY.

Practice—O. III, r. 6—Liquidated demand—Costs of execution.

The costs of an abortive execution are not a liquidated demand within Order III, r. 6. Where such costs were added to the amount of a judgment, and the whole made the subject of a specially indorsed writ, a summons for final judgment was dismissed.

SUMMONS for final judgment for £50 18s. 2d., money due under a judgment, and monies paid in respect of the issue of a writ of *fi. fa.* under the said judgment. The particulars were: Judgment in Supreme Court action, £44 9s. 2d.; costs of *fi. fa.*, £1 15s.; chief bailiff's expenses for levy, £4 14s.

MacDonnell, for plaintiff: The amount claimed is for a judgment and costs of execution. As to the former, a judgment can be the subject of special indorsement. *Hodsoll* v. *Baxter*, 28 L.J. (Q.B.), 61. The costs of execution are a liquidated demand, and were necessary to conclude the judgment.

O'Sullivan, for defendant: The costs of the execution should not be claimed on a specially indorsed writ. The indorsement being bad in part, the whole is bad, and the summons should be dismissed.

GRIFFITH, C.J., referred to *Re Long*, 20 Q.B.D., 316, and dismissed the summons with costs.

Solicitor for plaintiff: *Leeper.*

Solicitors for defendant: *Lilley & O'Sullivan.*

GRIFFITH, C.J.: 26th May, 1893.

Ex parte FRENCH, *In re* SHORT.

Insolvency—Execution creditor—Sale—38 Vic., No. 5, s. 113.

If an execution creditor seizes property and a sale follows without notice of any act of insolvency before the adjudication of the debtor, the execution creditor has a good title, but if the sale is not complete before adjudication, the creditor does not come under section 113 of *The Insolvency Act of 1874*, and his title does not prevail as against the trustee. If the execution creditor had notice of the filing of the petition before the seizure, the trustee is entitled to the property.

An order restraining the sale is proof of notice to the execution creditor before the sale.

MOTION to make absolute an order *nisi* calling upon Watson Brothers, execution creditors, to show cause why they should not deliver up possession of certain property, seized under an execution, to A. H. French, the trustee of S Short. A judgment having been obtained on 26th April, 1893, in the Small Debts Court by Watson Brothers against Sam Short, of Brisbane, builder, for £25 7s. 6d., the plaintiff, on 4th May, levied execution on the goods of the defendant, and a bailiff entered into possession. On 3rd May the defendant filed a petition for the liquidation by arrangement of his affairs. On 5th May an order was made by Real, J., restraining the execution creditors from proceeding till the first meeting of creditors on 19th May. On 19th May A. H. French was appointed trustee of the defendant's estate. The execution creditors refused to withdraw from possession. On 23rd May, on the application of the trustee, His Honour The Chief Justice granted an order *nisi*, returnable 26th May, 1893, calling on them to show cause why the bailiff should not withdraw from possession.

Stumm, for the trustee, moved the order *nisi* absolute.

O'Shea, for the execution creditors, showed cause.

GRIFFITH, C.J.: The order of events in this case was as follows:—(1) Petition for liquidation; (2) seizure under an execution for less than £50; (3) order restraining sale; (4) resolution of creditors appointing a trustee in the liquidation. It is alleged by the trustee that the execution creditor had notice of the filing of the petition before the actual seizure of the goods, but I do not decide the question whether this notice was in fact so given or not. If it was, the case is undistinguishable from *ex parte Duignan* (L.R., 6 Ch., 605). I assume, however, that the execution creditors had no notice of the petition until the service of the restraining order. The filing of the petition was an act of insolvency, and the title of the trustee when appointed relates back to that act of insolvency (S.C.). The property which was taken in execution was therefore the property of the trustee, unless the execution creditors can bring themselves within the protection of section 113 of *The Insolvency Act*. That section protects (subject of course to the provisions of section 102), notwithstanding a prior act of insolvency, any execution against the property of an insolvent, executed in good faith by seizure and sale, before the date of the order of the adjudication, if the execution creditor has not, at the time of its being so executed by seizure and sale, notice of any act of insolvency committed by the insolvent, and available against him for adjudication. The appointment of the trustee in a liquidation is, by section 202 (7), to be deemed to be equivalent to the order of adjudication. The act of insolvency referred to in section 113 is an act committed before the seizure (*ex parte Todhunter*, L.R., 10 Eq, 425, *ex parte Rocke*, L.R., 6 Ch., 795), so that, if before adjudication the seizure is followed by a sale without notice of the act of insolvency, the title of the execution creditor is not divested. But if the sale is not complete, as well as the seizure before the adjudication, the case does not fall within the express words of section 113, and the ordinary rule in insolvency that dealings with property which in law belongs to the trustee are invalid must apply (*ex parte Eyles*, L.R., 16 Eq., 99; *ex parte Pillers*, 17 Ch.D., 653; *ex parte Sulger*, *ibid.*, 839; *re Dickinson*, 22 Q.B.D., 187). The fact that an order was made restraining the execution creditor from selling until the holding of the meeting of creditors is not material, except as proof of notice to the execution creditors before the sale. It does not make the rights of the execution creditors any less than they would have been if no such order had been made (*ex parte Rocke*, *ubi sup.*). I am therefore of opinion that the execution creditors in this case were not at the commencement of the insolvency secured creditors of the debtor, and that they do not come within the protection of section 113. There must therefore be an order directing the plaintiff to withdraw from possession and deliver the property in question to the trustee. As the execution creditors persisted in their claim after the demand from the trustee they must pay the costs of the order. No costs of affidavits filed after the date of the order *nisi*.

Solicitors for trustee: *Atthow & Stumm.*

Solicitors for execution creditor: *O'Shea & O'Shea.*

HARDING, J. 17th and 20th April, and 29th May, 1893.

In the matter of The Companies Act, 1863, AND *in the matter of* THE QUEENSLAND MERCANTILE AND AGENCY COMPANY, LIMITED, IN LIQUIDATION.

Company—Winding-up—Proof of debt—Reducing valuation of security.

A bank in its proof of debt against a company valued the securities held by it at £87,667. On a summons to alter the valuation from £87,667 to £58,729 16s. 7d., and to prove against the company for the difference in addition to the sum already proved for,

Held, that, cause to the contrary not having been shown by other creditors of the company, the valuation might be so reduced, and the proof of debt be consequently altered and increased in amount by the amount of the difference between the two valuations.

SUMMONS to alter the value of a security in the liquidation of the above company, and for leave to prove for the difference in addition to the amount already proved for.

Feez, for the Union Bank of Australia, Limited; *Bannatyne*, for the official liquidator.

Bannatyne contended that the time within which the valuation might be corrected had passed, and that the Court had now no jurisdiction to correct the valuation. *Insolvency Act of 1874*, section 151, and rules 85, 86, and 119 thereunder; *in re Hopkins, Williams* v. *Hopkins*, 18 Ch.D., 370, but submitted to any order the Court might think fit to make.

Feez referred to *in re Leather Company* (Harding, J., in Chambers, 14th March, 1887); *Buckley on the Companies Acts*, 4th edition, p. 260, and *in re London, Bombay, and Mediterranean Bank, ex parte Cama*, 9 L.R., Ch. 686.

HARDING, J.: I adjourn the hearing of the summons till 20th inst., in order that I may be satisfied by affidavit as to the position of the liquidation proceedings, and the circumstances attending the mistake in the valuation of the Bank's securities.

On the adjourned hearing on 20th April, affidavits were read showing (1) position of the liquidation proceedings, and that the Registrar's certificate of debts and claims had not been filed; and (2) how the securities had been over-valued.

HARDING, J., made the following order:—That unless cause be shown to the contrary on the 29th day of May, 1893, the Bank's proof of debt be amended by altering its valuation of their securities in their proof of debt from £87,667 to £58,729 16s. 7d., and that the Bank be at liberty to value their securities at such reduced valuation, and to prove against the company as creditors for the sum of £102,992 2s. 6d. in place of £74,054 19s. 1d.; the appointment for the 29th day of May to be advertised in the same manner as the original appointment to prove debts and claims; the official liquidator to make or file on or before 29th May an affidavit in accordance with rule 22 of the rules under *The Companies Act, 1863*, in reference to the Bank's proof of debt.

On 29th May an affidavit of publication of the appointment, and the official liquidator's affidavit as directed by the order of 20th April having been read, and no cause being shown to the contrary, that order was made absolute with costs against the Bank.

Solicitors for the Union Bank: *Macpherson & Feez.*

Solicitors for the official liquidator: *Hart, Flower & Drury.*

CIVIL COURT.

GRIFFITH, C.J. 8th and 9th May, 1893.

In the matter of THE BRISBANE PUNTOWNERS' ASSOCIATION, AND *in re The Companies Acts. Company — Winding-up — Contributory — Paid-up shareholder — Surrender.*

M. and M. handed over punts to the company in return for fully paid-up shares. B. subsequently did the same. The directors about a year afterwards agreed to let these three men have their punts back on surrender of their shares together with a nominal consideration. The company afterwards went into liquidation, and the liquidator sought to have these three names placed on the list of contributories.

Held, that as there was no power under the Articles of Association to surrender shares the transaction was *ultra vires*, and that, as the owners of the punts had agreed to take fully paid-up shares, they ought not to be placed on the list of contributories.

Costs of all parties were allowed out of the estate.

In re Marlborough Club Co., 5 L.R., Eq. 365, followed.

Re National Savings Bank, 1 L.R., Ch. 547, and *re Anglesea Colliery Co., ibid.*, 555, not followed.

THIS was an application to settle the list of contributories in a company in liquidation. The official liquidator sought to have the names of Barker, Moltman, and Muir placed on the list as shareholders liable to contribute

The facts appear in the judgment.

Lilley, for official liquidator; *Lukin*, for Barker, Moltmann, and Muir, shareholders.

Lukin: The men were holders of fully paid-up shares, and even if their names were left on the register they are not liable to be put on the list of

contributories. *Lindley on Companies*, 783; *re Marlborough Club Co.*, L.R., 5 Eq., 365. There is no authority for the contention that a fully paid-up shareholder receiving back part of his capital becomes a contributing shareholder. *Spackman* v. *Evans*, 3 H.L., 171; *Evans* v. *Smallcombe*, *ibid*, 249. The transaction was *bona fide*.

Lilley: A paid-up shareholder cannot, without his consent, be placed on the list of contributories. But, under Table A of *The Companies Act*, there is no provision for the surrender of shares. These shares were surrendered without the knowledge of the public. *Leeke's case*, 11 Eq., 100; *re Disderi & Co.*, *ibid.*, 242; *Syke's case*, 13 Eq, 255; *Stringer's case*, 4 L.R., Ch., 475; *Rance's case*, 6 L.R., Ch.. 104; *Daniell's case*, 22 Beav., 43. There are two cases cited in *Manson's Law of Trading Companies*, 384, where paid-up shareholders were ordered to become contributories. *Murrough's case*, 16 Sol. Jo., 483; and *Digby's case*, 18 Sol. Jo., 184. The surrender was illegal. The transaction was a return of capital. They bought shares with punts instead of with sovereigns, and got the punts back. [GRIFFITH, C.J.: I cannot get over the fact that the *Marlborough Club case* has never been dissented from. *Coventry's case* (1891), 1 Ch., 202, is a late authority on the power of the Court to go behind the actual agreement between the parties. In this case there was no liability at the time the transaction took place, and the remaining shareholders entered into it knowing there was no liability.] The Court must go behind the transaction and see whether at the time of winding-up the parties were not shareholders.

Lukin referred to *De Ruvigne's case*, 5 Ch.D., 306.

GRIFFITH, C.J.: This is an application on the part of the official liquidator to settle the list of contributories, and to place the names of Barker, Moltmann, and Muir on that list. The company was formed for the purpose of purchasing the business or undertaking of the Brisbane Punt-owners' Association, which was to be paid for in cash, or in shares in the company. The articles of association did not authorise the surrender of shares to the company, nor the purchase of shares from the shareholders by the company. Two of the present litigants were parties who handed over to the company their punts, and received in payment fully paid-up shares; the third person, Barker, was not a party to that agreement, which was dated June 1st, but he agreed to give his punt to the company on the same terms; that was for fully paid-up shares. The company carried on the business for twelve months after that, when, apparently, the three parties before the Court were dissatisfied, and desired to get out of the company. It was proposed on one occasion by one of them, and seconded by another, that the company should be wound up; but the proposal was not carried. The directors agreed, however, a few days afterwards, to let the shareholders have their punts back on the surrender of their shares, together with a nominal consideration. As there was no power under the articles to surrender shares, that transaction could not have the effect intended. The effect clearly intended was that the shareholders should cease to be members of the company, and that the punts should be given back to them, but that transaction could not have that effect, as there was no power on the part of the company to accept the surrender of shares. I doubt also whether there was power to give away the property of the company, except for valuable and sufficient consideration. The question now arises, on an application by the official liquidator to settle the list of contributories, whether these three shareholders should be settled on that list as the holders of fully paid-up shares. It has been said that fully paid-up shareholders cannot be placed on the list of contributories. The case of *The Marlborough Club Company*, L.R., 5 Eq., p. 365, was an authority for that proposition. It is a very old decision, and to my knowledge has never been dissented from. I think I am bound to follow it, hold it to be good law, although I confess it is difficult to reconcile it with other cases which I have mentioned in the course of the argument (*The National Savings Bank's case*,

L.R., 1 Ch., 547; and *The Anglesea Colliery Company's case*, to be found in the same book, p. 555), in which it was held that paid-up shareholders were contributories within the meaning of the Act. The rule appears to be that paid-up shareholders are contributories if they claimed to be such; but if they do not desire it they are not contributories. I confess that I have difficulty in reconciling these decisions, but I think I am bound to hold that the decision in the case of *The Marlborough Club Company*, which has never been dissented from, is the rule of the Court. So that, if the persons now before the Court are fully paid-up shareholders, they ought not to be placed on the list of contributories. All the transactions in question took place before *The Companies Act of 1889* came into operation—on January 1st, 1890. Therefore the matter is to be considered as the law was under *The Companies Act of 1863*. At that time it was not necessary that shares should be paid for in money or in cash. It might be money, or money's worth. That provision has since been modified by legislation, and provision has now been made that when shares are not paid for in cash the agreement shall be registered with the Registrar of Joint Stock Companies. None of the parties in the present case were directors, although, with regard to Barker, it was attempted to show that he was a director; but the only manner in which the liquidator has attempted to prove that was by an unsigned entry in a minute book recording his resignation. However, I do not think that I should give effect to that in the face of Barker's oath that he was not a director. Consequently, as the parties were merely shareholders, they were not under such obligations as directors would be. In order to get them placed on the list of contributories the official liquidator has to show that they were shareholders at the date of the winding-up of the company, and that their shares were not fully paid-up, and for that he relies upon the transaction of the return of the punts, and contends that that was equivalent to the return of capital to the shareholders. No case has been brought before me in which it has been held that a transaction of that kind was equivalent to a return of capital. Some cases were mentioned in which the capital had been returned to the shareholders in cash, but of which we, unfortunately, have not the reports. The agreement intended to be made and carried out in the present case was that the persons before the Court should no longer be shareholders at all, that they should be deprived of all interest in the company, and relieved of all liability. I have been impressed a good deal with the argument that the transaction must be treated as a return of capital. It was said that, in point of fact, what was returned was exactly what had been given to the company; that these shareholders paid their contribution to the company in the form of punts, and were repaid by the return of the same punts. There is a certain amount of plausibility in that argument, but I think I am bound to look at the real nature of the transaction. So far as the effect on the company is concerned, it seems to me quite immaterial that the property was the same as that which was given in the first instance. For if Barker had received Moltmann's punt, and Moltmann had got Muir's punt, and Muir had got Barker's punts, the result to the company would have been exactly the same. The effect would have been the same to the company if some other property belonging to the company equal to the nominal value of the shares had been given them. So that I feel considerable difficulty in acceding to the argument that it was a return of capital in the same sense as a return of money paid upon shares. Moreover, the effect of so holding might be to do grave injustice. The property given up by the company might be worth, perhaps, only £100, while, if I held that that was equivalent to a return of the capital, the liability of the shareholders would be the full amount of the shares, perhaps £500. And the shareholder would be deprived of the opportunity of setting up any defence that he might have to a claim for the value of the property. No instance has been cited to me in which a Court has held that a man was to be treated as the holder of unpaid shares when the only contract between

him and the company was that he was to take fully paid shares. I think that if this transaction was *ultra vires*, as I assume it to be for the purpose of my decision, the result is that neither party acquires any rights under it, and that I should regard the case as if it had not taken place, except so far as the company might be entitled to relief in respect of the property which it has lost. But I do not think I am bound to hold that a consequence never contemplated by the parties has followed, and that the members have become the holders of shares not fully paid. The case of allottees of shares at a discount is distinguishable, because in that case they intend to take ordinary shares, and the statute law then imposes on them the obligation to pay the full amount in cash, an obligation which the company cannot dispense with. There is no similar statute law applying to this case. In the present case the shareholders in question were at first the holders of fully paid-up shares. The company never agreed that they should be the holders of any other kind of shares, nor did they so agree with the company. The transaction which took place was never intended to have that effect. I think that full justice can be done between the parties by holding that the transaction was merely *ultra vires*. I think I am bound to hold that the parties in the present instance are the holders of fully paid-up shares. The transaction, however, appeared so singular in the face of the agreements, that the liquidator was justified in bringing it before the Court. I think, therefore, that both parties should have their costs out of the assets. The order I make is that the names of the shareholders in question shall not be settled on the list of contributories, and that the costs of both parties shall be paid out of the assets.

Solicitors for official liquidator: *Chambers, Bruce & McNab.*

Solicitor for shareholders: *R. J. Leeper.*

HARDING, J.: 15th, 16th, and 17th May, 1893, and 2nd June, 1893.

PLANT AND OTHERS *v.* THE ATTORNEY-GENERAL AND OTHERS.

Crown grant—Reservation of minerals—Royal mine—Prerogative of Crown right to gold—Trespass — Injunction — Demurrer against prayer of claim.

A deed of grant from the Crown reserving all mines of coal and other public rights, without mentioning Royal mines, must be presumed to have reserved Royal mines. Lands granted to a subject in Queensland stand with respect to Royal mines in the same position as land granted to subjects in England.

Where Royal mines do not pass under a grant, all that passes is the land, exclusive of the stratum containing the Royal mine, which belongs to the Crown. The reservation of mines is equivalent to the reservation of the stratum of subsoil containing the minerals, and an injunction will not lie at the suit of the owner of private property to restrain trespassers from removing soil from such a stratum. A demurrer will not lie against the relief claimed in the prayer of the claim.

Attorney-General v. *Morgan* (1891), 1 Ch., 432; *Millar* v. *Wildish*, 2 Wy. & W. (Eq.), 37; *Woolley* v. *Attorney-General*, 2 Ap. Ca., 163, followed.

DEMURRER.

The statement of claim set out that the defendants were a foreign company, the Day Dawn Block and Wyndham Gold Mining Company, Charters Towers. The plaintiffs were the Church Land Syndicate, Limited, a company carrying on the business of gold mining at Charters Towers. The plaintiffs held, as lessees, a parcel of land situated in the county of Davenport, parish of Charters Towers, being allotment 2 of section 16 and containing 2 acres, 1 rood. The defendants were the lessees from the Crown, under the provisions of *The Goldfields Act of 1874*, of a certain piece of land adjoining the lands of the plaintiff company, and were also mining for gold. The defendants had sunk a shaft on their land, and on divers days, between the 15th September, 1889, and the commencement of the action, had excavated certain drives and levels from such shaft under the plaintiff's land, and it was contended that by such means they had taken large quantities of gold, or auriferous stone, to a very considerable amount in value out of the land, and had removed large

quantities of earth and stone from the said land, and were continually trespassing thereon. The quantity of auriferous stone so taken out amounted to 606 tons and upwards, and by reason of such removal the plaintiffs' lands were being gradually depreciated in value for mining and all other purposes. They applied for an order restraining the Day Dawn Block and Wyndham Gold Mining Company from carrying on any of the further operations complained of. The plaintiffs further asked for an account of the gold which had been so taken out, and that the defendants should be ordered to pay to the plaintiffs the amount so taken, and claimed £1,000 damages for trespass. The defendants paid £20 into Court, and entered a defence generally denying the facts in the statement of claim, and demurred to so much of it as claimed against the defendants an account of the gold alleged to have been taken from the lands of the plaintiff company, or any inquiry as to the value thereof, or that the defendants might be ordered to pay to the plaintiffs what should be found due upon the taking of an account, contending that the same was bad in law on the following grounds:—(1) That the statement of claim did not disclose any right, title, or interest of the plaintiff syndicate to or in the said gold or auriferous stone, or to any part thereof; that it did not appear that the Crown had granted to the plaintiff syndicate any property in or right to or in respect of such gold or auriferous stone; that it was not alleged that the Attorney-General ever consented to apply the past or future proceeds of gold mining on the said lands, or any of them, to the benefit of the plaintiff syndicate; that, for all that appeared by the statement of claim, the Attorney-General might not have known of, or consented to, the mining for gold on the part of the plaintiff syndicate, as alleged, until after the alleged taking of gold by the defendants.

The demurrer was heard at the Full Court, in December, 1892, before Cooper, Chubb, and Real, JJ.

Byrnes, *S.G.*, and *Lilley*, for the plaintiffs; *Feez*, for the defendants other than the Attorney-General, in support of the demurrer.

REAL, J.: The demurrer is against the prayer of the claim, and therefore cannot be good.

Byrnes, *S.G.*: I intend to raise that objection and cite *Watson* v. *Hawkins*, 24 W.R., 404, and *Daniell's Ch. Practice* (6th edition), 534.

COOPER, J.: Can you quote any authorities, Mr. Feez, to support your position?

Feez: No, your Honour.

COOPER, J.: The objection must be upheld, and the demurrer dismissed with costs.

CHUBB, and REAL, JJ, concurred.

The action came on for trial before Harding, J., and a jury, on 15th May, 1893.

Lilley, for plaintiffs; *Jodrell*, for the Attorney-General; *Feez*, and *Shand*, for the other defendants.

Lilley, after the close of the evidence, applied to amend the claim by adding a paragraph that the defendants had wilfully encroached on the land of the plaintiffs.

Feez opposed, and leave was refused.

The following questions were put to the jury, and the answers are annexed.

1. Are the plaintiffs registered under *The Gold Mining Companies Act of 1875?* No.

2. Do the plaintiffs carry on the business of gold mining at Charters Towers, or elsewhere in the Colony of Queensland? No.

3. Are the plaintiffs registered under *The Gold Mining Companies Act of 1886?* Yes.

4. Have they carried on the business of gold-miners or otherwise? No.

5. Did Dicken, Ross, Robinson, and Mills, by a memorandum of transfer of September, 1887, transfer the lands to Plant and Paul? No.

6. Did Dicken, Robinson, and Mills, by a memorandum of transfer, signed 12th September, 1885, transfer the lands to the Diocesan Synod of North Queensland? By a memorandum of transfer registered 12th November, 1885.

7. Did the Synod, by a transfer registered 25th September, 1887, transfer the lands to Plant and Paul? Yes.

8. Are the plaintiffs, the Church Land Syndicate, mining for gold under the lands with the consent of the Attorney-General? No.

9. Did the defendant company, between 15th September, 1889, and the commencement of their action, trespass and remove stone? Yes.

10. Are the defendants using their drive as a means of access to a part of their mine? Yes.

11. How much have they removed? 605¼ tons of stone.

12. Are they inflicting irreparable injury? Yes.

13. Have they depreciated the value of the lands? Yes.

14. Do they threaten to continue? Yes.

15 Was the defendants' action in question 9 (*a*) inadvertent? (*b*) wilful? Answer (*a*) No; (*b*) wilful by negligence.

16. What damages (1) for injury to property beyond removal of stone with gold? Nominal, one shilling; (2) by use of way leave for carrying through plaintiffs' property? £400; (3) coercion? (*a*) inadvertent, £2,422; (*b*) wilful. £2,633 18s. 6d.

The foreman stated by the answer to question 15 (*b*) they meant that the defendants knew they were approaching the plaintiffs' ground, and took no steps to find it out and to stop the encroachment.

Lilley moved for judgment for £3,033 19s. 6d., and for an order restraining the trespass.

Jodrell asked for the costs of the Attorney-General on the ground that the plaintiffs had failed to support the only allegation made against him.

Feez moved for judgment for the defendant company. The plaintiff is only entitled to one shilling, and £20 has been paid into Court. The action is for damages, not for trespass The plaintiffs are not entitled to a restraining order, unless it is shown that injury has been done to the surface of the land. The Crown alone is entitled to minerals. The Attorney-General is the only person who can prevent mining for the precious metals, and he has not chosen to do so. *Attorney-General* v. *Morgan* (1891), 1 Ch., 432, 444; *Millar* v. *Wildish*, 2 W. & W. (Eq.), 37; *Star Freehold Co.* v. *Inkerman & Durham Co.*, 3 W. W. & A'B. (E.), 181; *Attorney-General* v. *Scholes*, 5 W. W. & A'B. (E.), 164; *Woolley* v. *Ironstone, Lead, and Gold Mining Co.*, 1 V.L.R. (E.), 237.

Shand: The plaintiffs have shown no grant from the Crown, and therefore are not entitled to the property upon which the defendants trespassed. They are not entitled to relief for such trespass, unless they can show the property to which they have a title is injured by the trespass. *Eardley* v. *Granville*, 3 Ch.D., 826. The Crown not having interfered, the plaintiffs are not entitled to damages or an injunction.

Lilley: The plaintiffs are entitled to the injunction and damages. The mine did not become royal until it was commenced to be worked. There is a difference between a royal mine and mineral-bearing stone. The defendants have taken away a part of the land of which the plaintiffs had possession. A grant of land includes land from the surface to the centre of the earth, with the exception of the right of the Crown to royal minerals. If the Crown did not step in, the right of the owner is good as against all others. The Crown has stood aside and stated they would be content with a royalty on the gold extracted. The defendants were trespassers. [HARDING, J.: You could only get the royal minerals by express enactment.] The gold is not mentioned in the reservations in the deed. [HARDING, J.: The deed gave you only what was stated in it. The moment gold is shown there, your right is rebutted.] The finding as to irreparable injury is general.

Feez in reply: The plaintiffs are not entitled to anything for way-leave. The hole created is the property of the Crown.

HARDING, J.: This matter involves questions of the greatest importance, and I had at first contemplated reserving my decision in order to deliver a written judgment; but I have always felt that it is more desirable that a judge of first instance should give a speedy judgment rather than one delayed, although not, possibly, in better language,

and better constructed. Bowing, then, to what has been my constant practice since I have been on the Bench, I proceed to deliver the judgment at once. The action was tried before me a few days ago, and at the end of the trial the learned counsel for the different parties made several motions, which are now for decision. Mr. Lilley moved for judgment for the plaintiffs for £2,633 18s. 6d., with £400 and one shilling. The sum of one shilling was the sum awarded by the jury for damages suffered by the plaintiff in respect of injury to property beyond the removal of stone with gold. The £400 was for damages in respect of the user by way of way-leave—of a drive by way of way-leave through the plaintiff's property—and the sum of £2,633 18s. 6d. was for damages for conversion of the material taken therefrom by the defendants. Now, in obtaining these items of damage from the jury, I read the ninth paragraph of the statement of claim, and I told them that the use of the words of that paragraph was a short way of referring to all the material referred to in paragraph 9, which I read to them; that is to say, when they said with respect to stone and gold, and in respect to conversion, they meant large quantities of stone with gold, and earth from the first-mentioned land—a very considerable amount of stone and earth from the first-mentioned land. It is necessary to explain that, because, on account of the short form the questions take—they say simply stone or conversion; but the question referred to the whole thing which came out of it—gold, stone, and rubble, all mixed together—the contents of what is now a hole—a drive. Upon that Mr. Jodrell moved for judgment for the costs of the Attorney-General against the plaintiff, and Mr. Feez moved for judgment for the defendant company, alleging that they had paid £20 into Court, and that that was more than sufficient to cover the sum of one shilling, which was all the plaintiff ought to recover, even on the findings in this action. I have not gone back to the facts of the case, because they were so recently before you, but the points for decision are really, shortly, these:—Whether the plaintiffs are in possession of, or entitled to, the property over which the defendants have trespassed, and are therefore entitled to any relief in respect of that trespass; and further, has the trespass unduly injured the property to which they have a title? That really will be the main question on the various points arising in this way. The land was granted from the Crown, or, I should say, the plaintiffs' title is under a grant from the Crown, dated 10th May, 1877. The grant is in the ordinary form, and contains at the end a reservation of all mines of coal and other public rights, not mentioning royal mines. Now, under that, the question is whether or not the plaintiffs have a right to the gold under the land granted. First of all, to trace the law from the old country. *The case of Mines*, reported in *Plowden*, 336, decided that the king by his prerogative hath all mines of gold and silver to be made money. The Crown has that. Then this question has been recently dealt with in England in the case of *The Attorney-General* v. *Pritchard Morgan* (1891), 1 Ch., 432, and the marginal note says:—"The relaxation in favour of the subject of the royal prerogative in respect of royal mines which was effected by the Acts 1 Wm. and Mary, c. 30, and 5 Wm. and Mary, c. 6, does not apply to a mine which is worked simply as a gold-mine, even though the gold is found mixed with the ores of the baser metals mentioned in the Acts, if the quantity of the baser metals is so small as to be valueless for the purpose of working. In such a case the prerogative of the Crown remains unaffected, and the mine cannot be worked by a subject, even on his own land, without the license of the Crown." North, J., at p. 443, said:—"Upon these facts I have no difficulty in coming to the conclusion that the mine on the Gwynfynydd Farm is a gold-mine and nothing else. The defendant himself paid a royalty to the Crown for working it; he sold it as a gold-mine to the company he promoted to purchase it; the company so formed to buy and work it was called the Morgan Gold Mining Company; it has worked for gold alone, and has paid royalty thereon, and has sold gold only; and has, in fact, found nothing

else, except in such small quantities as above mentioned. The suggestion that the mine is worked for other minerals as well as gold is a fiction." Then, further on, the judgment proceeds:—"In this concession, however, no royal mines, or mines of gold and silver, were included, and such mines have from the first always been, and still are, the exclusive property of the Crown as part of the royal prerogative. The defendant remarked with severity upon the hardship of the Crown's claiming the gold which is found in the land of a subject, and belongs to him; but, as the gold does not belong to him, and he has no right to touch it without authority from the Crown (except so far as he acquires such right under the Statutes to be mentioned presently), these comments have no foundation. The well-established right of the Crown to all gold and silver extended not only to these metals themselves when found in a comparatively pure state, but also to all other ores and substances containing gold or silver; and in the great *case of Mines*, before the twelve judges, in the reign of Queen Elizabeth (1568), it was decided authoratatively by all the judges and barons "that, by the law, all the mines of gold and silver within the realm, whether they be in the lands of the queen, or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore," and it was agreed unanimously by nine out of the twelve judges "that, if the gold or silver in the base metal in the land of a subject be of less value than the base metal is, as well the base metal as the gold or silver in it belong by prerogative to the Crown, with liberty to dig for it, and to put it upon the land of the subject, and to carry it away from thence, and in such case it shall be called a Mine Royal, for the records do not make any distinction herein, but they are general, and prove that all ores, or mines of copper or other base metal containing or bearing gold or silver, belong to the king." And it was held accordingly that a large quantity of copper ore from a copper mine belonged to the Crown, because it contained some gold and silver; and that the mine was a royal mine. Three of the judges seem to have taken the view that this might have been otherwise, and that the mine would not have been royal if it had been proved that the value of the copper exceeded the value of the gold and silver contained in it; but this was opposed to the view of the other nine judges, and has never been adopted; and, having regard to the facts which I have stated, has no bearing upon the present case. Subsequently to that decision, divers questions arose as to the proportion which the gold or silver should have been to the baser metal containing it, in order to make the mine a royal mine; and, in the years 1640–1641, an opinion was signed by fifteen eminent counsel to the effect that, if the value of the gold or silver, when extracted from the baser metal, was more than the charge of refining it, or was worth more than the base metal spent in refining it, the mine was royal, and the baser metal, as well as the gold and silver therein, belonged to the Crown." Then Lindley, L.J., at p. 456, says:—"Although the gold or silver contained in the base metal of a mine in the lands of a subject be of less value than the base metal, yet, if the gold or silver do countervail the charge of refining it, or be of more worth than the base metal spent in refining it, this is a mine royal, and as well the base metal, as the gold and silver in it, belong to the prerogative of the Crown." Much more, it seems to me, does the quartz in which the gold is mixed, or the alluvial, if there is alluvial there—in fact, the whole strata which the gold runs through, is a royal mine. Now, that is the law of England, and under such a grant by the Crown of lands and mines, the ores royal, or the mines royal, do not pass. So that, in order to ascertain whether, in a grant from the Crown, mines royal are passed, it would not be sufficient that mines should be granted. Much more so under this grant which I have read must it be held that the mere exception of coal will not act as against the Crown, on the maxim of *expressio unius est exclusio alterius*. Now, the next thing to ascertain is the law out here. The case of *The*

Attorney-General of British Columbia v. *The Attorney-General of Canada*, 14 Ap. Ca., 295, is a decision of the Privy Council on this point, so far as that part of Her Majesty's dominions are concerned, and there it was held "that a conveyance by the province of British Columbia to the Dominion of 'public lands,' being in substance an assignment of its right to appropriate the territorial revenue arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land, but belong to the Crown, and under section 109 of *The British North America Act of 1867*, beneficially to the province, and an intention to transfer them must be expressed or necessarily implied." Now, the latest case which goes to the fact of how far the royal prerogative of England applies outside England in Her Majesty's dominions, is that of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (1892), Ap. Ca., p. 437:—"*The British North America Act, 1867*, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion, in respect of the powers, executive and legislative, public property, and revenues as are vested in them respectively. In particular, all property and revenues reserved to the provinces by sections 109 and 126, are vested in Her Majesty as sovereign head of each province" That shows that the prerogative attaches under the acts of the Governor of that particular part of Her Majesty's dominions, and exists there so far as it is given by the Acts incorporating or constituting those provinces, and is not diminished or derogated from by local legislation. Now, here, the Act 18 and 19 Vic., c. 54, conferring the constitution of New South Wales before separation, in section 2, vests the management and proceeds of Crown waste lands in the colony in the legislature of the colony. Our Act, 31 Vic., No. 38, consolidating the laws relating to the constitution of this colony, in sections 30 and 40, provides the general powers of the legislature respecting the sale and other disposal of waste lands in the colony. Only so far as an Act of Parliament enacts, is the common law of England, or the law of England in existence at the time of the founding of this dependency, abrogated here. By *The Goldfields Act, 1874*, we find provision made for the management of goldfields, and the powers under which persons may be allowed by the Government, for the time being, to obtain and appropriate to their own use the gold under the waste lands of the colony; in other words, the lands which have been granted or contracted to be granted away from the Crown. Somewhat similar conditions are contained in *The Mineral Lands Act of 1872*, which provide for dealing with other minerals under the waste lands of the colony. Then, at the time this deed of grant was issued there existed *The Crown Lands Alienation Act of 1876*, which provided for the means by which, and the extent to which, the waste lands of the colony might be disposed of by the Executive from time to time, and these lands were lands, at the time they were dealt with, not dedicated to public purposes, not under engagement for sale or pastoral lease, or in any other way in which a limited interest is created or already granted. By the 4th section of that Act, the Governor-in-Council is empowered in the name of Her Majesty, and subject to the provisions of the Act, to grant and alienate in fee simple the waste lands of the Crown, but such grant and alienation shall be made subject to such reservations as may be made in the lease under which the right thereto shall have been acquired, and subject to any other reservations or conditions. In other words, that no special reservation or condition shall be put into these grants except what was specially mentioned in some Act of Parliament. During the argument one Act of Parliament has been referred to me by which the Crown can grant away a royal mine, and I have not been able to find any such power myself. Consequently, I think that the lands granted to a subject in this colony stand, with respect to roya

mines, in exactly the same position as land granted to subjects in England. That being so, I shall proceed to consider what I think would be the position there, and I, first of all, extract from *Eardley* v. *Granville*, 3 Ch.D., 826, what I think is the effect of the existence of royal mines under lands in the hands of a subject. This was not a case in which gold was in question, but it was a case in which the mines and minerals in copyhold were in question. Such a class as copyholders do not exist here, but the difference is so clearly pointed out in that case that I think it is a case from which we can draw a definition about it, and build on it. It starts with a marginal note to this effect :—"In an ordinary copyhold manor the estate of the copyholder is in the soil throughout, except as regards trees, mines, and minerals, the property in which remains in the lord. When the lord has removed minerals, the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines, and remains the owner of the vacant space from which minerals have been removed. In a Crown manor, where the Crown and its lessees were by custom entitled to enter upon the land for the purpose of working minerals, the defendant, the lessee of the Crown mines, who was also lessee of the S. mine outside the manor, claimed a right to use a crut or underground way beneath the land of the plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the S. mine to the deep pit by which the manorial mines were worked, and thence by a branch railway constructed by the defendant over part of the same copyhold to the main line." Now, the facts of the case sufficient for our purpose are these, as stated by the Master of the Rolls at p. 834 :—"The freeholder retains the mineral stratum as part of his ownership, and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land. But he says in the case of a copyholder that is not so, because the copyholder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property and possession in this sense: that the moment the minerals are taken away the space is in his possession, and he only can interfere with it, the lord having no right to do so. The same proposition was laid down in the case of *Lewis* v. *Branthwaite*, 2 B. & Ad., 437, where Lord Tenterden expressly puts it, that there is no distinction between trees and minerals as regards the law of copyholds, and so in the case before Lord Campbell of *Keyse* v. *Powell*, 2 E. & B., 132. Then it has been suggested that the recent case of *Duke of Hamilton* v. *Graham*, L.R., 2 H.L., Sc. 166, has, somehow or other, altered the law; but it has not. That was a Scotch case, and it was treated as being the same as a grant by an English freeholder. It exactly concurs, therefore, in its reasoning, with the decision of Vice-Chancellor Wood in the case of *Proud* v. *Bates*, 34 L.J. (Ch.), 406; and the decision of Lord Campbell in *Bowser* v. *MacLean*, 2 D., F. & J., 415, that where a freeholder grants land excepting the mines, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals: in other words, to retain a stratum of the property. And, if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton* v. *Graham* decided. It decided that the same law applies to Scotland which applies to England. In a case like that the word "mines" meant subsoil containing the minerals, and not merely the minerals themselves." Now, that is exactly what has happened in the present case, the only difference being that instead of coal and ironstone, the defendants have been getting quartz with gold—quartz and other materials containing gold. The bill prayed an injunction against the defendants from conveying any coal or other produce underneath the plaintiffs' mine. Jessel, M.R., says at p. 831 :—"It is said that because Ann Adams, by her lease of 10th September, 1852, gave the defendant the right to carry the coals or minerals from any mines belonging to him or belonging to Sneyd (for this purpose

it is immaterial), therefore she gave him a right to carry not only over her freehold, but over the copyhold; and it is said she must have given him the right for this reason: because he afterwards made a communication underground from the pit by means of a crut to Sneyd's land on the other side of the copyhold lands; that is, instead of sinking a pit in the freehold of Sneyd, which adjoined the freehold of Ann Adams, he made a communication underground from the deep pit by a crut through the copyhold land, and then carried the coal up the deep pit, and thence along the railway. The other part of the case is still more singular when I look at the answer. The crut was made in the way described, and the result was that the coal passing under the copyhold lands of the plaintiffs, formerly of Ann Adams, it was brought from Sneyd's land out of the manor, through an opening or tunnel under the copyhold lands belonging to the plaintiffs without their consent. The law on that subject has been well considered, and it has been settled by authority which is certainly binding upon me. The law seems to stand in this way: The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber-trees, and minerals. As regards the trees and minerals, the property remains in the lord, but in the absence of custom he cannot get either the one or the other, so that the minerals must remain unworked, and the trees must remain uncut. The possession is in the copyholder; the property is in the lord." Here, Mr. Lilley has contended that the possession of the whole is in the freeholder. "If a stranger cuts down the trees the copyholder can maintain trespass against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; but, if the copyholder cuts down the trees, irrespective of the question of forfeiture, the lord can bring his action against the copyholder. So in the case of minerals. If a stranger takes the minerals, the copyholder can bring tresspass against the stranger for interfering with his possession; and the lord may bring trover, or whatever the form of action may be, against the stranger to recover the minerals. The same rule applies to minerals as to trees. If you once cut down a tree the law cannot compel the copyholder to plant another. The latter has a right to the soil of the copyhold where the tree stood, including the stratum of air which is now left vacant by reason of the removal of the tree. So if the lord takes away the minerals, the copyholder becomes entitled to the possession of the space where the minerals formerly were, and he is entitled to use it at his will and pleasure. If you have a shaft made for working the mines, the copyholder may descend in the shaft, and either walk about in the shaft below, or use it for any other rational purpose." That is what a copyholder can do; he may get into his hole and enjoy himself. "That is the position of the copyholder. That being so, and there being no mineral in this crut, if that is the law, the earl, as Crown lessee, cannot have a greater right than the Crown, that is the lord or lady of the manor. He has therefore no right now to trespass on the copyhold for any purpose whatever, because I assume he does not want it for the purpose of working the manorial minerals; for that purpose he has a right to use it, but assuming that he does not want it for that purpose, but only wants it for the purpose of carrying the coal from under Sneyd's estate—that is, foreign coal—he has no right to use it at all. Of course, the injunction to be granted will only restrain him from using it for that purpose; it will not affect the other rights. It is not trespass while he carries Crown minerals. It is trespass when he uses it for any other purpose. I take it that the law is clearly settled, and I am surprised to hear it disputed. In the first place the law is laid down, perhaps not so accurately as might be wished as regards the words used by Lord Campbell in *Bowser and MacLean*:—"I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals;"—he should have said "of the

mines," but he has used the words "reservation of the minerals," meaning an exception of the mines—"or freehold land where the surface belongs to one owner, and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically instead of laterally." That is quite intelligible; what he means is this—he does not say it, but he means it—"if a freeholder grants lands excepting mines, he severs his estate vertically; *i.e.*, he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum." Thus far, if that is the correct way between parties and parties, A. grants to B. a black acre reserving the coal-mines therein. What B. gets is the surface down to the stratum where the coal-mine lies, and that stratum does not pass to the grantee. Much more would I say that all grants of the Crown are to be adversely considered against the grantee, and so I would say where the Crown grants a piece of land, and the laws of the land say that royal mines do not pass under that grant, what passes is the land down to that stratum where the royal mine begins, and the stratum which contains the royal mine, belongs to the Crown and does not pass. From the observations upon this point, in the case of *Hamilton* v. *Graham*, which is said to be an authority the other way, the Master of the Rolls says:—"It has been suggested that the recent case of *The Duke of Hamilton* v. *Graham* has somehow or other altered the law, but it has not." This is a very different deduction from what Mr. Lilley got. In other words, it was decided that the same law applied to Scotland as to England. "That was a Scotch case, and it was treated as being the same as a grant by an English freeholder. It exactly concurs, therefore, in its reasoning with the decision of Vice-Chancellor Wood in the case of *Proud* v. *Bates*, and the decision of Lord Campbell in *Bowser* v. *MacLean*, that where a freeholder grants lands excepting the mines, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property. And if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton* v. *Graham* decided. It decided that the same law applies to Scotland which applies to England. In a case like that the word "mines" meant subsoil containing the minerals, and not merely the minerals themselves" Now, if that be the construction of the grant, the next question to consider is of what did the grantee, under such a grant, take possession when he settled himself upon the surface? Mr. Lilley said the person in possession of the surface was *primâ facie* in possession of all up and down—*cujus est solum, ejus est usque ad coelum et ad inferos*. That maxim I admit to the fullest extent, but neither maxim nor laws can bind the Crown unless they are specially made to do so, and, therefore, the *primâ facie* part of the presumption is rebutted, in my opinion, the moment you show the existence of minerals underneath. The moment you show the existence of minerals underneath you show there is an exception from the grant, and there being an exception from the grant, the question is: taking possession of the surface, did he take possession of what he had no right to, because his grant only gave him possession of what was granted to him? Now, this maxim of *cujus est solum, ejus est usque ad coelum et ad inferos*, does not apply in all cases. I have had examples of grazing before, which has been held by this Court to be a possession for the purpose of depasturing cattle for the herbage. Then again, we have knowledge of the old block claims in mining. The position of a block claim went under that of another man. There, as soon as the block claim was shown, the man's possession right down was ousted as soon as he came to the block claim. So there are a number of cases of copyholders' qualified possession, and in England it is known as possession under a grant excepting the minerals. This instance might be illustrated to any extent. I think that, possibly, that case to which I referred in the argument of

Coverdale v. *Charlton*, 4 Q.B.D., 104, will elucidate to some extent what we are now considering. There the possession had been given under *The Inclosure Act* in 1776, and Bramwell, L.J., at p. 118, said:—"I think that the plaintiff has not been able to make out his case. It was attempted to be made out in this way: it was said that there was a *de facto* possession." That is what Mr. Lilley has tried to make out here: "but it is difficult to say that there is a *de facto* possession when there is no possession except those parts of the lane which are in actual possession, and there is an interference with the enjoyment of the parts which are not in actual possession. My meaning is this: if there were an inclosed field and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common. If it would not be a *de facto* possession it would be a nominal possession. If no right were attached to it, it would not be a constructive possession. That I look upon as being the condition of things, and, consequently, the plaintiff has not a *de facto* possessiou beyond the spots where his animals are grazing" So here, in this case; what is Mr. Lilley's possession? He has the surface, and he has a grant under which he is entitled to that surface, and down till he comes to a royal mine. Then he skips over the royal mine and goes down until he strikes another royal mine—until he comes to a place where I trust he will never go, but where he has a right to go under this deed. Then Mr. Lilley says that the defendants in this case are wrongdoers I might mention here the case of *Ruabon Brick and Terra Cotta Company* v. *The Great Western Railway Company*, 9 Times L.R., 121, where it was held that "The owner of minerals under a railway is entitled to work them from the surface, and to enter upon the land of the railway company for that purpose." Mr. Lilley's contention is this: we are in possession of the surface; we have a *de facto* possession right down. If that is the case, what does it dwindle down to? Something less than actual possession; less than imaginary; and it dwindles down to the position that the property belongs to somebody else. But he says, as we are in possession of the surface as against the world at large, we are entitled to assume that we have a possession right down, which we may enforce against anybody else. As a general principle that is true; but it came out in this case, and it would have come out whether or no by the plaintiffs' own pleading, that he held his land under a grant from the Crown, and if he did not hold his land, but was a mere trespasser, probably his rights as against a wrongdoer would be the same. A part of the law of the land is, that all mines are in the Crown, and are excepted from his title—his freehold; consequently I do not see myself that he has any right in the stratum containing the royal mine at all. If he has no right there at all, how can he interfere with anyone else? It is not like a copyholder who has possession of it, and as soon as the coal is gone a vacant space comes. His recourse under that might probably be to go lower, but he has not even got that in this case. That is the conclusion to which I have come by the light of the English authorities which I have quoted. And I think that an examination of the four Victorian authorities, referred to by Mr. Feez, will be found to support my view, as regards the Supreme Court of another colony—the colony of Victoria. The first case in order of date was that of *Millar* v. *Wildish*, 2 Wy. & W. (Eq.), 37. The marginal note is this:—"Gold under land alienated from the Crown is not the property of the owner of the land, and neither he nor anybody else has a right as against the Crown to take it. An owner of private property may, by injunction, restrain a trespasser mining and taking minerals belonging to him—the owner; but, as the mere owner, he is not entitled to an account of gold removed from under his land, nor to an injunction to restrain the future removal of gold, the gold being in no way his. The removal of underground

earth by a trespasser is not a subject of injunction unless real damage to the plaintiff's use of the surface result from it. And a general averment of irreparable damage, not showing specially any inconvenience resulting from the undermining, is not sufficient to maintain a bill for an injunction against the removal of the soil. Molesworth, J., at p. 46, says:—"On the authorities I should hold that an owner of private property might, by an injunction, restrain a trespasser mining and taking minerals belonging to him—the owner. As to an owner here, mining himself with the acquiescence of the Crown, it is unnecessary for me to express any opinion. But, with considerable hesitation, I have arrived at the conclusion that the present plaintiff, as mere owner seeking protection and account for gold under his lands, fails, because the gold is in no way his; and as to the removal of underground earth by a trespasser, that is not a subject of injunction unless real damage to the plaintiff's use of the surface result from it." It is unnecessary for me to say that I agree with that, because here my holding is that a royal mine excepts the stratum, and consequently it is not necessary to touch that. The next case was that of *The Star Freehold Company* v. *The Inkermann and Durham Company*, 3 W. W. & A'B., (E.), 181, where Mr. Justice Molesworth gave the following decision:—"In this case the plaintiffs claim, as assignees of a lease of land, the surface of which was reserved to the lessor. The lease was originally granted to the Western Freehold Company, and has been assigned to the Star Freehold Company, and their position is that of persons having a legal interest in the land in question. The defendants, having shafts adjoining, are undermining the ground, but their undermining is in no respect attributable to the claim they have to the surface. So that I have to deal here with the case of a legal lessee of land, who complains that persons having shafts on adjoining lands are undermining the leased land to which he has an exclusive right. There is a dispute between the plaintiffs and defendants as to which has the best equitable rights under certain contracts made by Morrison, a former owner of the land, and there may be more or less colour of right as between the parties. But it is a case simply of lessees who have legal rights being encroached upon by adjoining owners from within their own ground. I, therefore, do not think that the case is to be distinguished from *Millar* v. *Wildish*, and refuse to grant the injunction. Costs to be costs in the cause." The next case was that of *The Attorney-General* v. *Scholes*, 5 W. W. & A'B. (Eq.), p. 164. In this case which I am now trying, I may state, gentlemen, that I am dealing also with the demurrer. I did not say so at the commencement. I did not think it necessary to do so; but that is understood to be the case now, and I now decide the demurrer. The marginal note says:—"An injunction ought not to be granted pending the reservation of the decision of the Court upon a demurrer putting in issue the right of the plaintiff to relief. If an injunction be granted in such circumstances by the primary judge, the Full Court will entertain an appeal from such grant, even after the injunction has been dissolved by a judgment on the demurrer. In respect of mining for gold by strangers upon private land, the Attorney-General has a right to an account of the gold raised, and to stop further mining. The owner has a right to restrain it only as far as it injures his enjoyment of the surface. Where an owner of private property has been mining for gold with the consent of the Attorney-General, he may join him as plaintiff in an information and bill against trespassers, but not where he has been mining without such consent. An infant cannot be a relator. Leave given to amend an information and bill, by converting it into an information only, and substituting some proper person as relator instead of an infant relator. In an information and bill by the Attorney-General and a plaintiff, it is not proper to join matters in which both have not a common interest." The last of the Victorian cases was *Woolley* v. *The Attorney-General of Victoria*, and this case went home. It is found in L.R. 2, App. Ca., p. 163. Colville, L.J., says, at p. 166:—

"Now, whatever may be the reasons assigned in the case in *Plowden* for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that decision it has been settled law in England that the prerogative rights of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass." I think that throughout these authorities, where gold and precious metals are meant, royal mines are meant, and it means not only the gold taken out, but the stratum of land in which the gold or precious metal is contained. I think I have dealt somewhat at length with the law on the case, and it is one of those interesting legal cases which one would have taken pleasure in writing out at length, but I have indicated my clear conviction, as far as I can, upon the law applicable to the facts. The result is that Mr. Lilley fails except as to one shilling, and £20 having been paid into Court, there will be a judgment for him for the payment of that one shilling from the £20. The "inflicting irreparable injury" means, I understand, irreparable injury in the royal mine. On the law laid down by me the answers relating to the stratum containing the royal mine are immaterial. I shall enter judgment for the defendants, the money in Court to be repaid the defendants, excepting the one shilling which has to be paid to the plaintiffs. The defendants to have the costs of the action so far as they are not provided for by any rule of Court as to payment into Court. There still remains to be disposed of Her Majesty's Attorney-General as represented by Mr. Jodrell. The Crown has been made a party to the suit, and the Attorney-General has pleaded that he does not admit that the plaintiffs are mining for gold under the lands, and says, on behalf of the Crown, that he claims a royalty in respect of the gold taken or extracted from the lands, at a rate to be determined by the Governor of Queensland by and with the advice of the Executive Council. He claims that it should be paid out of any damages so recovered, but otherwise makes no other claim. In other words, he is ready to take something from either side. Well, the plaintiffs have thought it necessary to bring him here, and as the Attorney-General has got nothing from either side, I think he must have his costs I will order the plaintiffs to pay the Attorney-General's costs in this action.

Solicitors for plaintiffs: *Bernays & Osborne.*

Solicitors for defendants: *Marsland & Marsland.*

MATRIMONIAL CAUSES JURISDICTION.

HARDING, J. 19th May, 1893.

O'BRIEN *v.* O'BRIEN AND HOLLANDER.

Divorce—Wife's costs not paid before hearing—Delay.

An application to postpone a trial for dissolution of marriage, on the ground that the wife's costs *de die in diem* had not been paid, was refused where the wife had delayed having her bill of costs taxed.

The application should be made before the case is called.

ACTION by James Francis O'Brien for a dissolution of marriage against Mary Josephine Louisa O'Brien, on the ground of adultery with Abraham Alfred Hollander. Both the respondent and co-respondent made counter-charges of adultery against the petitioner.

Lilley, and *Macgregor*, for petitioner.

Rutledge, and *St. Ledger*, for respondent.

Power, and *Feez*, for co-respondent.

After the case had been called, an application was made on behalf of the respondent that the proceedings should be suspended until the petitioner had paid the respondent's taxed costs *de die in diem*. An affidavit by P. J. O'Shea was read, stating that the taxing officer had given his certificate for £119 6s. 3d. on 18th May, and that £33 0s. 3d. of that amount was not disputed.

Rutledge: The action should be stayed until the petitioner has paid the respondent £33 0s. 3d., and paid the balance into Court *Keane* v. *Keane*, 3 L.R., P. & D., 52; *Browne on Divorce*, 5th edition, 363. [HARDING, J.: The case has been

commenced. You are too late.] I must protect the interests of my client.

Lilley: The taxing officer's certificate was made yesterday at 3-30 p.m., after banking hours. It was impossible to pay the money by this morning. There is a review pending on the amount disputed. The respondent's delay is the cause of non-payment. *Bridgman* v. *Bridgman*, 20 L.T. (N.S.), 87.

HARDING, J.: This is an application, made on behalf of the respondent, to have the present proceedings suspended until the petitioner has paid her taxed costs *de die in diem*, amounting to £119 6s. 3d. An affidavit by the respondent's solicitor has been read, from which it appears that the taxing officer adhered to his previous decision. The sum of £33 0s. 3d. is not disputed. These are the facts on oath. There is no evidence as to the time when the certificate was issued. It has been stated that it was at half-past three o'clock yesterday afternoon. If that is so, it has not been shown that the certificate was issued in time to allow the petitioner to pay the bill. It is manifest it was not issued in time. This application is based on insufficient evidence. I follow the course adopted by me in *Finlay* v. *Finlay and Gardner*, 28th March, 1892. That practice has not been overruled, and must be taken to be the law. I now refer to the order of His Honour The Chief Justice made on May 5th last, which directed this cause to be tried on 15th May, which is this time. That order was made in the presence of the respondent's solicitor. There is no reservation whatever in the order. According to the authorities cited by Mr. Rutledge, the practice is not to appoint a day for the hearing until the taxed costs of the respondent have been paid. If the respondent had called the attention of The Chief Justice to the fact that there were costs outstanding due to the respondent, no doubt the order would have been postponed to enable the costs to be paid, or the date of the hearing would have been fixed subject to the payment of the costs before that time. These costs were incurred before the last Full Court. On May 4th an order was made that the respondent's costs should be taxed *de die in diem*. The respondent had full knowledge of these costs, which should have been taxed. This she delayed to do till the 18th instant. In the meantime the respondent appeared and made no objection to the trial to-day. By accepting the order, and allowing the case to be called on to-day, the respondent has waived her rights, and the motion must be refused. I have power to grant costs for any unreasonable delay that may occur in such a case as this, but no application has been made to me in this case, therefore I shall not make any order. I shall, however, be prepared on any future occasion, if the necessity arises, to hear and decide an application for such costs out of the sum paid into Court. I mention this, because in cases of this kind it behoves the parties advising respondents to exercise very great care in the proceedings taken in their behalf. The grounds for this opinion are that a petitioner has to find the money for the respondent from time to time, and also conduct his own petition, and if the strictest care is not taken in the conduct of these proceedings, the respondent, by abusing her rights, may deprive the petitioner absolutely of ever gaining justice. So far as such a matter comes within my jurisdiction I shall visit severely at any time the least departure from the course which I have marked down. I shall even be prepared to diminish the costs by a frivolous appeal which brings about a postponement of the case. The respondent must suffer for the delay. The motion is refused.

Solicitors for petitioner: *Lilley & O'Sullivan.*
Solicitors for respondent: *O'Shea & O'Shea.*
Solicitor for co-respondent: *Barnett Cohen.*

JUNE SITTINGS OF THE FULL COURT.

Re MORSE.

Barrister—Admission—Barrister and Solicitor of Victoria — Reciprocity — Regula Generalis, August 1st, 1893.

A barrister and solicitor of Victoria will not be admitted

as a barrister of the Supreme Court of Queensland, unless he received his early education in Queensland and went to Victoria to complete his education, and was admitted as a student-at-law there before the 23rd November, 1891.

APPLICATION for admission as a barrister by James Donald Morse. Mr. Morse had been admitted as a barrister and solicitor of Victoria. He was a native of Queensland, and educated here. He then went to Melbourne University to qualify as a barrisrer, intending to return to Queensland. After he had been admitted a student-at-law in Victoria, the law was changed. He passed the necessary examination, and received a certificate from the Board of Examiners for Barristers in Victoria, but was admitted as a barrister and solicitor on account of section 10 of *The Legal Profession Practice Act, 1891*. The Board here declined to give him a certificate, as the two branches of the profession were not distinct in Victoria.

Byrnes. A.G., moved the admission. The professions are not now distinct in Victoria, and the Board here refused Mr. Morse his certificate. He qualified as a barrister, but greatness was thrust upon him, as he had to be admitted both as a barrister and solicitor. [GRIFFITH, C.J.: Will a Queensland barrister be admitted by the Victorian Supreme Court?] They have been admitted there. [HARDING, J.: Will they be admitted since the passing of the new Act?] I do not know of any case. The question of reciprocity should not be raised, especially as Mr. Morse is a Queensland student.

GRIFFITH, C.J.: What was the necessity for the *Amending Act?* I do not see how the case can be brought within our rules.

Scott, for the Board. The Board were unable to grant the certificate, as rule 17 requires that the professions must be distinct in the country of the applicant, and there must be reciprocity between the two colonies. The professions are not now distinct. In view of the recent decisions *In re Kerin and Lynch*, 13 A.L.T., 226; and *In re Forbes*, 14 A.L.T., 108, the Board considered there was no longer reciprocity. Service under articles is required in all cases by section 11. This Court has decided in *in re Adams*, 4 Q.L.J., 41, that where the two professions are not distinct in the applicant's country, the applicant is entitled to admission here only as a solicitor.

An adjournment was then granted, and on the application being renewed at the August Full Court, it was announced that a new rule had been promulgated whereby any person who had received his early education in Queensland, and had proceeded to Victoria to complete his education, and had become a student-at-law there before the 23rd November, 1891 (the date on which the abovementioned Act was assented to), and admitted as a barrister of Victoria, might be admitted as a barrister of the Supreme Court of Queensland.

GRIFFITH, C.J.: This rule gives Queensland students enrolled before the passing of *The Legal Profession Practice Act, 1891*, the same protection as Victorian students have by section 13 of that Act. The Board must certify, in accordance with rule 21, that the applicant is fit and capable to practice, and that he is a *bonâ fide* Queensland student, and comes within the provisions of *Regula Generalis* of August 1st, 1893. It is not sufficient to certify that he is a barrister of Victoria. A Victorian barrister will not be admitted here unless he is within that rule.

The necessary certificate was then produced, and the applicant admitted.

HALL *v.* QUEENSLAND RAILWAY COMMISSIONERS. *Ex parte* MATHIESON.

Bathurst Burr Act—Noxious weed—Divisional Boards Act of 1887, ss. 177, 179—Breach of statutory duty.

The Bathurst Burr Act is not impliedly abrogated by *The Divisional Boards Act of 1887*. A duty is imposed on a Board in exoneration of an individual, and when the Board fails to perform that duty it cannot take action against the individual for neglecting to do what the statute says must be done by the Board. Bathurst Burr is a noxious weed.

MOTION to quash a conviction, under *The Bathurst Burr Act*, on the complaint of the

Inspector of the Clifton Divisional Board against the Queensland Railway Commissioners, for not complying with a notice to clear half of the lands vested in them of Bathurst Burr. The defendants were fined £5, and £5 5s. costs.

Byrnes, *A.G.*, and *Wilson*, for appellants.

Lilley, for respondent.

Byrnes, *A.G.*: The complaint disclosed no offence. No duty was cast on the Commissioners to destroy the noxious weeds. *The Bathurst Burr Act* was impliedly repealed by *The Divisional Boards Act of 1887*. Before the creation of Divisional Boards the management of roads was vested in municipalities. The respondent had no right to sue. By section 14 of *The Bathurst Burr Act* all penalties are payable to Her Majesty. It would be remarkable if the Commissioners, in whom Crown lands are vested under *The Railway Act*, were liable to a penalty which would go into the Treasury. *Clarke* v. *Bradlaugh*, 8 Ap. Ca., 354.

GRIFFITH, C.J., referred to *Reg.* v. *Barker*, 25 Q.B.D., 213.

Lilley: The question of the repeal of *The Bathurst Burr Act* by *The Divisional Boards Act* was decided in *Roberts* v. *Mackay*, *Courier* Reports, 8th May, 1890. The former Act applies to the whole colony. There are two liabilities under these Acts, and they can both exist at the same time. If there is no by-law made by a Board declaring the burr to be a noxious weed, *The Bathurst Burr Act* comes into operation again. The Act is not impliedly repealed. *Rex* v. *St. George's*, *Hanover Square*, 3 Camp., 222; *Rex* v. *Netherthong*, 2 B. & A., 17; *R.* v. *Oxfordshire*, 4 B. & C., 194.

Byrnes, in reply: If *The Bathurst Burr Act* is not repealed the Commissioners can proceed against the Board for not doing its duty.

GRIFFITH, C.J.: This is a rule to quash a conviction made under *The Bathurst Burr Act of 1863*, which imposes upon the owners of land abutting public roads the obligation to destroy Bathurst burr and thistle growing upon half of the road adjacent to their land. That is no doubt founded on the old rule that the soil up to the middle line of the highway is vested in the owner of the land. The obligation to destroy Bathurst burr and thistle might be enforced upon the application of any person to any justice of the peace, who might make an order for convicting the person for not destroying it, or punish him for not destroying it, or might give an order which would entitle a person to go and destroy it himself. At the hearing before the justices the facts seem to have been practically admitted. The case proceeded almost entirely on admissions. The contention between the parties seems to have been that, under *The Divisional Boards Act of 1887*, the obligation to destroy Bathurst burr and thistle on roads opposite to their land was abrogated, in consequence of that duty being imposed on the Divisional Board by section 167 of *The Divisional Boards Act*, which says it shall be the duty of the Board to extirpate and destroy any noxious weed or plant found on any road or reserve under the control of the Board. The question arose incidentally whether Bathurst burr was a noxious weed. The question arose between the parties whether the provision of *The Divisional Boards Act* applied to that weed, or whether that provision was abrogated. But previous to that I may say that it was understood between the parties, and assented to, that Bathurst burr is a noxious weed, and that I should have very little difficulty myself in coming to the conclusion that it is. Certainly, in pastoral districts every one knows that sheep passing through country in which there is Bathurst burr are entirely ruined, or seriously deteriorated in value. I think that question settled; and I come to the conclusion that, for the purposes of this case, Bathurst burr must be a noxious weed or plant. The Act having imposed upon the Board the duty of extirpating or destroying it, I should feel disposed to hold, as between the public and individuals, that they cannot abrogate that duty by putting it on individuals. An affirmative Act does not ordinarily repeal a prior affirmative Act, unless the two Acts cannot stand together. I do not see why, under some circumstances,

the two cannot stand together. For instance, a Divisional Board may be in a state of suspended animation, and for other reasons they may agree together that they should not perform their duties, or they might fail to perform their duties. It does not necessarily follow that the obligation cast upon individuals by another Act ought to be suspended. I should feel disposed, if necessary, to decide that the provisions of *The Bathurst Burr Act* are not abrogated or repealed by implication by the provisions of *The Divisional Boards Act*, but, as between the individual owner of the land and the Divisional Board, it seems to me it must be held that the obligation of the individual remains as compared with the obligation of the Board. It seems to me that the latter Act intended, between the individual and the Board, to impose a duty on the Board in exoneration of the individual. The Act expressly imposes the duty on the Board to destroy noxious weeds. That duty was cast by a prior Act upon the individual, but I think that the latter Act intended to transfer it from the individual to the Board. If that is so, the Board, having failed to perform its duties, cannot complain before justices that private individuals have failed to perform this duty which, by the statute, has been cast upon itself. It would be a singular thing if the Board, having failed to perform the duty cast upon them, could take an action against an individual for neglecting to do a duty which the statute says must be done by the Board. On the other hand, the Board, at whose instance these proceedings were taken, ought not to be allowed to maintain them. On that point it is admitted that the proceedings were taken on their part. I think the proceedings were not taken properly, and that this conviction ought not to have been made.

HARDING, J.: I think the Board could not take these proceedings on the grounds stated by The Chief Justice. With respect to whether one Act is repealed by the other, I find it unnecessary to decide the point. On the other point, as of the case, for the reasons given by The Chief Justice, I think the conviction should be quashed.

COOPER, J.: I agree with the judgment of The Chief Justice for the same reasons.

GRIFFITH, C.J.: The rule will be granted without costs.

Solicitor for appellants: *J. Howard Gill*

Solicitor for respondent: *Curnow.*

COVENTRY *v.* NATIONAL ASSOCIATION OF QUEENSLAND.

Negligence—Liability of landlord to guest of a tenant—Licensee.

Plaintiff, as a journalist, was present at a ball given in the hall of the Exhibition Building, at the invitation of a Ball Committee, to whom the building had been let for the night by the defendants. While she was so present, a window in the building fell in and injured her.

Held (affirming the judgment of Real, J.), that the defendants by reasonable diligence could have discovered the defective condition of the window and prevented the fall, and were liable for negligence; and that the plaintiff, although present on invitation, was in the position of a guest, and as such was associated with the committee and not a bare licensee, and was entitled to damages.

McMartin v. *Hannay*, 10 Court of Session Ca., 3rd series, 411, followed.

MOTION to set aside a judgment of Real, J., on a verdict of a jury for £475 for damages caused through the fall of a window in the Exhibition Building, on the grounds that the plaintiff was a bare licensee; that there was no negligence on the part of defendants; that there was no duty cast on the defendants to prevent injury to the plaintiff; that the premises were under the control of the Ball Committee; and for wrongful rejection of evidence.

The building was let by the defendants to a Ball Committee for the purposes of a ball. The plaintiff was present as a journalist at the request of the committee. During the evening a window fell in and injured the plaintiff. The evidence showed that the committee allowed Trackson, an electrician, to pass electric wires under a window which was secured by two chains. On the night of the ball the window was open six inches, and

an attendant, owing to the warmth of the evening, endeavoured to open the window still further, when it fell in and injured the plaintiff. The jury found the defendants had not used reasonable care in securing the window to the frame, and were liable for negligence.

Feez, for defendants, in support of appeal; *Byrnes*, *A.G.*, and *Rutledge*, for plaintiff.

Feez: There was no monetary consideration between the plaintiff and the Ball Committee, and no consideration at all as between the plaintiff and the defendants. If a landlord lets premises, even in a dangerous state, he is not liable to tenants, customers, or guests, for accidents happening during the term. *Beven on Negligence*, 1075; *Robbins* v. *Jones*, 15 C.B. (N.S.), 221; *Owings* v. *Jones*, 9 Maryland Rep., 108. Plaintiff was at most a bare licensee, and not entitled to relief. *Southcote* v. *Stanley*, 25 L.J., Ex. 339; *Bolck* v. *Smith*, 31 L.J., Ex. 201. [HARDING, J., referred to *Indermaur* v. *Dames*, L.R. 2, C.P., 311.] Plaintiff was in a worse position than guests who paid for admission. *Gallagher* v. *Humphrey*, 6 L.T. (N.S.), 684; *Sullivan* v. *Waters*, 14 Ir. C.L.R., 460. Plaintiff was lawfully present, but not at the invitation of defendants. *Burchell* v. *Hickisson*, 50 L.J., Q.B., 101; *Ivay* v. *Hedges*, 9 Q.B.D, 80. [HARDING, J., referred to *McMartin* v. *Hannay*, 10 Court of Sessions Cases, 3rd series, 411. CHUBB, J., mentioned *Gwinnell* v. *Eamer*, L.R. 10, C.P., 658.] The rejected evidence—that the Ball Committee were warned not to interfere with the window—might have altered the findings of the jury. The premises were under the control of the Ball Committee, who, through their agent Trackson, interfered with the window.

The Attorney-General was requested by the Court to confine his argument to the improper rejection of evidence.

Byrnes, *A.G.*: Immediately after the question had been rejected, the witness Trackson said he left the window in a perfectly safe condition. The objection was properly made, as there was no plea of contributory negligence.

HARDING, J.: This was an action brought by Amy Coventry against several gentlemen named collectively the trustees of the land of the National Agricultural and Industrial Association of Queensland, and against that association for damages in respect of an injury which she received while attending a ball at their Exhibition Building. The jury awarded her £476 5s. They found that this building was, on the 1st of September, under the control of the council and trustees of the association; that on that day a ball was held in the building, which was duly hired from the council and trustees for the purpose, by a committee called the Naval and Military Ball Committee; that, in effect, she came by an invitation ticket which was sent to her newspaper, she being a reporter of such festivities; that, while she was present in pursuance of her calling, and doing her work as such in a part of the building so engaged by the ball committee, a window fell upon her; that it fell upon her by reason of its deficient condition; that defendants might, by exercise of reasonable care and diligence, have discovered such defective condition of the said window and remedied the same. Now, under those findings, to put it shortly, she was a person invited to that ball by the committee, who had paid the defendants money for the use of the building, and that the defendants had granted the use of that building to the ball committee for the purpose of a ball, and that, whilst she was there on such a ticket, as I said, a window fell upon her; that, at the time the building was granted it was, *quâ* this window, in a defective condition, and defendants might, with reasonable care and diligence, have discovered and remedied the defect. Now, I take it as a general proposition of law that when one man engages of another to supply him with a particular article or thing to be applied to a certain use and purpose in consideration of taking payment, he enters into an implied contract that the thing should be reasonably fit for the purpose for which it is to be used, and to which it is to be applied. Here, if consideration is wanted (I do not think it was), I think that the granting

of the building was in respect of a sum to permit as many persons to enter that building as paid to be in that building, and who could be put in it, and that, in respect of each of these persons, an adequate part of that sum for the whole of the evening is applicable to each person. In giving a decision in this case, in my opinion, the consideration is not necessary. There are authorities which I referred Mr. Feez to—I do not think it necessary to mention them in detail, but amongst them I may say that we find the case of *McMartin* v. *Hannay*, 10 Court of Sessions Cases, 3rd series, 411, which is a Scottish case. In that case the landlord, following the custom there, had let a house in flats. A child, belonging to one of the tenants, was killed by falling through an opening in the staircase, caused by the absence of one of the rails. This defective condition of the stairs had been brought under his notice, and it was held that he was responsible for the loss of life, because by reasonable care and intelligence—having notice of the defect—he could have avoided it. Now, that case is as nearly as possible on all fours with this case, and follows out the implied contract which I maintain arose upon the granting of the use of this building by the defendants to the Ball Committee. I do not propose to go through the cases of *Nelson* v. *Liverpool Brewery Co.*, 2 C.P.D., 311; *White* v. *France*, *ibid*, 308; *Sandford* v. *Clarke*, 21 Q.B.D., 398; *Heaven* v. *Pender*, 11 Q.B.D., 503; and *Smith* v. *London and St. Katharine's Dock Company*, L.R. 3, C.P., 326, because I think these cases all support the view I I have taken, and I think the entering of the judgment on these findings by the judge was correct. *Gwinnell* v. *Eamer* was also mentioned by Mr. Justice Chubb, but I think these cases are sufficient to support my decision. The cases cited by Mr. Feez are all distinguishable from this. They would have been applicable if Mr. Feez's client had been suing the ball committee, but they do not, in my opinion, meet the present case. And another thing they are not cases of invitation, but cases of mere admission. I think this is not a case of admission, but a case of invitation, and that, by such invitation, Mrs. Coventry became one of the persons there under the grant of the use of the building for the evening. And with regard to the wrongful admission of evidence, that might have been very material had the question of contributory negligence been raised. There was no question of contributory negligence raised, and consequently the knowledge of the injured person could have nothing to do with it. I do not think, if a person grants the use of a building to a party, and the implied contract for fitness exists—and I consider it did exist—that an actual notice by the person granting the building to the person using it that there was danger would, of necessity free the grantor from liability. It might have the consequence of debarring the persons from carrying out their pleasure, and it might give them another form of action, but that is not an outcome in evidence in a case where contributory negligence formed no part of the case. Consequently, on the whole, I think that the judgment must stand, and that the rule must be dismissed with costs.

COOPER, J: I am of the same opinion for the same reasons.

CHUBB, J.: In this case the defendants let the Exhibition Hall for a ball. That, of course, implied that guests would be invited to that ball, and, in my opinion, the relation of landlord and tenant was created by the letting of it. There was a consideration—if it were necessary to hold that a consideration was required—for £5 was paid for the use of the hall. The plaintiff was there, in my opinion, as the guest of the ball committee; that would not mean that she was there by the invitation of the defendants, for they had nothing to do with the building after letting it; nor could it be said that she was there as a licensee, because they had never asked her to be there. She was there as the guest of the ball committee. It appears to be the law that the landlord is liable for the guests of the tenant, if he knows that strangers will be invited and the premises are in a dangerous condition. The jury have found that the premises were in a defective state; that

the defendants had reasonable means of knowledge that that was the case, and by reasonable exercise of that knowledge could have found it out; and that the window fell by reason of this deficient condition, and defendants were responsible. To my mind these answers of the jury must be taken to mean that the defendants must be taken to have known at the time they let the hall that the window was in this defective condition. The opening of the window on a hot night could not be regarded as an unfair user; on the contrary, it would be perfectly justifiable. Therefore there is nothing to show that it was improperly used, nor was there any issue raised upon that Therefore, I think, on the authority of the cases cited by Mr. Justice Harding, and also on the other cases of *Nelson* v. *The Liverpool Brewery Co.*, and *Gwinnell* v. *Eamer*, that the plaintiff is entitled to hold her verdict. I agree with the learned judge's judgment.

Solicitor for plaintiff: *F. G. Hamilton.*

Solicitor for defendants: *G. V. Hellicar.*

LETHBRIDGE *v.* ECHLIN.

Appeal—District Court—Judges' notes—55 Vic., No. 33, ss. 145-147—Bailment—Bill of sale—Non-registration.

E. being the owner of certain goods and in possession, on 1st June, 1888, executed a document with S. containing an inventory of the goods, and at the end were the words "By cash £300, June 1, 1888. Signed R. B. Echlin." E. continued in possession, and on 4th August, 1891, a petition for the liquidation of his affairs was presented. On 8th August plaintiff, administrator of S., by a letter to E., who was still in possession, put a man, Eades, in possession jointly with E. Shortly after Eades went out of possession, leaving E. in sole possession. Plaintiff had no notice of E.'s insolvency at the time. The document was not registered, and E.'s trustee failed to elect to take advantage of the avoidance of the bill of sale. It appeared from the correspondence that E. acknowledged the plaintiff's ownership of the goods, but he attempted to get a title from his trustee to the goods by giving him £2 for them. E. endeavoured to retain possession.

Held, that the document was a bill of sale, and not being registered was inoperative; that E.'s trustee, by failing to avoid the bill of sale, must be presumed to have refused to do anything with the goods; that E. was a bailee for S., and that the plaintiff was entitled to the goods.

A judge of the District Court should sign a note of the point of law raised before him, and of the facts found by himself or the jury. A copy of the judge's notes is not sufficient.

APPEAL, by the defendant Echlin, from a decision of Paul, J., in favour of the respondent, plaintiff in the action.

Lilley, and *MacDonnell*, for the appellant.

Byrnes, *A.G.*, and *Feez*, for the respondent.

The facts of the case appear in the judgment.

HARDING, J.: How does this matter come before us?

Lilley: Notice of appeal has been given under section 144 of *The District Courts Act*. A certified copy of the judge's notes has been supplied to the Court signed by the Registrar.

HARDING, J.: I do not see how we can go on unless we have the material required by section 145.

COOPER, J.: We want the facts. All we have is the evidence. We want the judge's findings. The point may be very short and the evidence lengthy. If there was no jury the judge should state his findings, and sign his decision. This is a lazy method.

Lilley: The procedure is new. The Court will not put the parties to the expense of a further trial. Both sides are prepared to admit that the certified copy is a copy of the notes taken. [CHUBB, J.: Then you will make us a jury. HARDING, J.: Is there an appeal from a judgment of the District Court on anything but a question of law? *Smith* v. *Baker* (1893), A.C., 325.] Taking a note is not a condition precedent to the right of appeal. The point was raised below, and notice of appeal given. *Seymour* v. *Colson*, 5 Q.B.D., 359; *Morgan* v. *Rees* 6 Q.B.D., 89, 508.

Byrnes, *A.G.:* Justice cannot be done without the whole of the evidence. Our title does not depend upon the bill of sale in question.

The Court then heard the facts of the case.

Lilley: The bill of sale was not registered, and is inoperative. *Re Leslie*, 5 Q.L.J., 7. We have our title from the trustee. The bill of sale being avoided the trustee was entitled to the property.

Byrnes, *A.G.:* This is an attempt by a man in

possession of goods under an agreement, to keep goods belonging to another person. The defendant is estopped from disputing the plaintiff's title to the goods. The trustee in Echlin's case had no right to the goods. *Leslie's case* is distinguishable. If the bank handed over the goods to a warehouseman, and the trustee stood on one side, could the warehouseman in an action for detention by the bank say "your bill of sale has not been registered; I am entitled to stick to these goods"? *Rogers, Sons & Co.* v. *Lambart & Sons*, L.R. (1891), 1 Q.B., 318. The judge found all the facts against the defendant. Echlin was our bailee. It has been held that in certain cases a bailee may set up a *jus tertii*, but if a bailee accepts the bail with knowledge of an adverse claim he cannot afterwards set up the adverse claim as against the bailor. *Re Sadler, ex parte Davies*, 19 Ch. D., 86; *Evans Principal and Agent*, 298; *Everest and Strode on Estoppel*, 205.

Lilley: We are not setting up a *jus tertii*. We claim to have secured our title from the trustee.

HARDING, J.: This is an appeal from the District Court Judge. All that we have before us is a note signed by the District Court Judge on a point of law raised by Mr. Macdonnell, one of the counsel in the case, on an application for a non-suit. In addition to that we have a copy of the Judge's notes, certified to by the Registrar of the District Court. *The District Courts Act*, section 145, says: "At the trial or hearing of an action or matter in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at the trial or hearing, and of the facts in evidence in relation to that question, and of his decision on it, and of his decision of the action or matter." Section 146 also provides: "In any action or matter in which the judge has, at the request of either party, made a note as in the last preceding section mentioned, he shall, at the expense of any party or parties to the action or matter, furnish a copy of the note so taken at the trial or hearing, or allow a copy of it to be taken by such party or parties, and he shall sign the copy, whether a notice of appeal has been given or not, and the copy so signed shall be used and received at the hearing of the appeal." In my opinion, what we should have now is a note signed by the judge, not merely of the point of law raised, but of the facts in evidence, and then the questions upon which he decided that point of law, and whether the facts were in evidence—that is to say, whether they were found by himself or by the jury. This we have not got in this case, and we think that it should be the practice in future cases that the judge should take a note of the point of law, and also of the facts decided by himself or by the jury, upon which that point of law is decided. Then we can tell how he has found the facts. But here we have only the point of law and the judge's notes of the case. That has embarrassed us to a certain extent, because we are unable to see what the judge thought as to certain facts, or the want of certain facts. We have dealt with the case in this way: The judge having found in a certain way, we can only reasonably suppose that he found the facts on the evidence before him in such a way as to support his judgment. Although in this case, with the assistance of counsel, who happened to have been both at the trial, we are able to give a decision, we hope that in future the intimation of the Court will be attended to by District Court Judges in signing notes for the purpose of appeal. That disposes of the preliminary point. The case was between one Lethbridge and Jackson and Echlin, for conversion and detinue of certain goods claimed by Echlin, and in his possession. The facts of the case are that, in 1888, the defendant, Echlin, was the owner of these goods, and was then in possession. On the 1st June a document (Exhibit A) in this form was signed between the parties: "Samuel Stewart. Dr. to R. B. Echlin, Bulimba. Balance of loan on household goods, by cash £300. 1st June, 1888, signed R. B. Echlin." Now, in my opinion, by the execution of that document, no other evidence or explanation being before us, Echlin mortgaged these things to Stewart. In other words, there was a bill of sale over these goods from

Echlin to Stewart. Echlin continued in possession, and matters went on until 4th August, 1891, when a petition for liquidation was presented, which subsequently resulted in a resolution for the liquidation of the affairs of Echlin. On the 8th August, 1891, the plaintiff, by a letter addressed to Echlin, who was then in possession on the plaintiffs' behalf, put Eades into joint possession with Echlin of the premises. for the executors of Stewart. Eades and Echlin continued in such possession for three days, until the 10th, and then, after the lapse of that short time, Eades went out leaving the defendant, Echlin, in possession, and from the documents in evidence it clearly appears that at this time Echlin recognised the fact that he held possession on behalf of the executors. Now there is nothing in the case to show that at this time the executors had any notice of anything amounting to an act of insolvency, or of anything that would subsequently result in the insolvency of Echlin. Consequently, until they had notice of the petition, or of an act of insolvency which justified a subsequent adjudication or proceeding resulting in liquidation, they had a right to deal with the property without notice, and consequently, the action taken by the plaintiffs at that time was legal. Now here there was no evidence—I do not know as a fact whether there was or was not knowledge—that at this time the plaintiffs knew that Echlin was taking proceedings for liquidation. Consequently, until they had notice of that, they had a right to deal with them and take them out of his possession so as to make them safe. This they did by putting Eades in, and at that time there is ample evidence that Echlin held, and for a long time afterwards understood that he held this property as mortgagor in favour of the plaintiffs. Now we will go on, and we find that subsequently to this the resolution for liquidation was passed. Then *The Bills of Sale Act of 1891* came into operation on the first day of January, 1892, and it is said that the bill of sale required to be registered before 31st March, and it was not, and consequently, under *The Bills of Sale Act*, the document became inoperative as between the parties—that is to say two parties, the liquidating debtor and the plaintiffs—and the profit at once passed to the trustee. I doubt that. The deed might become inoperative, but in order to sue for the possession of these goods the trustee had, first of all, to have elected to take them. He would have to elect to take advantage of the avoidance by the Act. He never did anything of the kind, and non-election for a certain time may, in the opinion of a jury with the surrounding facts before them, amount to an affirmation, or the opposite—a dis-affirmance or abandonment. The determination as to whether he did not elect, I think would be a question for the jury in the case. Now the judge has decided that the plaintiffs should succeed, consequently it must be presumed that he has decided that the trustee by not electing to take steps in a reasonable time to escape the avoidance, if avoidance there was of that bill of sale, affirmed the transaction. Now, if that be correct, and that is the law which I consider applies to this case, we proceed to a further time. We find letters from Echlin acknowledging the rightful ownership of the plaintiffs, when all of a sudden—we do not know who tempted him, but some temptation arose—at all events he was tempted, and he succumbed to the temptation, thinking "Oh well, let me get the trustee's title added to my possession and I will save my *penates*." Following out this temptation, he goes to the trustee and secures from him a document amounting to an acceptance of his offer, and then, when he has got this, he says: "Now I can hold the goods." Now, being, as I said, in possession, how does he stand with regard to the plaintiffs? He took the goods right from the plaintiffs. He held the goods and the plaintiffs sent another man to take possession of the goods on their behalf. Echlin recognised the title of the plaintiffs, and continued to do so up to a short time before the temptation. As Jessell, M.R., in the case cited by the learned Attorney-General (*ex parte Davies*) says: "it was a beginning or attempt to serve two masters, and he has met with the usual fate." The only way in

which he could serve his bailor, and his bailor had a right to be served, was by returning the goods. I think that in this case there is no *jus tertii* at all. I think there is no right in the defendants at all legally to the goods. I think that he is a bailee for the plaintiffs, and that the plaintiffs had a right to demand of him and recover from him their goods in the form of action which they have taken, and I think that the appeal should be dismissed with costs.

COOPER, J.: I am of the same opinion. The appeal should be dismissed with costs. I think that the defendant in this case has been "hoist with his own petard." In June, 1888, he sold his furniture to the plaintiffs, and gave them a document which was an inventory. At the end of it he proclaimed himself indebted to them, and gave a receipt for the money. It is admitted that that document is a bill of sale, and there can be no doubt about it. But the defendant says that the document was inoperative because it had not been registered. He says "it is perfectly true that I am bailee for you, the plaintiffs; it is perfectly true that I declined to give up the property because that document has not been registered, and I, myself, have purchased them from a person who was the nominal trustee of my estate." Now I am of opinion that the document which transferred the right of the trustee is in itself a bill of sale. Now this is the document. It is a reply from the trustee or the late trustee. Echlin had written offering to buy the furniture for £2 2s. The trustee replies—"Dear Sir, With respect to your letters, I accept £2 2s. for my right, title, and interest in the goods * * * Received £2 2s." Now a bill of sale under *The Act of 1891* is defined to be "a receipt for purchase money of chattels, or any other assurance of chattels." This document to my mind is clearly that, and there are excepted the following things—"transfers of goods in the ordinary course of business." I am of opinion that this is not a transfer of goods in the ordinary course of business, of trade or calling, and it does not come within the exceptions of the Act. To my mind it is clear that this document was a bill of sale, and it was admitted that it was not registered, and therefore, in my opinion, the defendant cannot set up any title under that document. Therefore it seems to me the defendant is relying upon a document which is just as invalid as that on which the plaintiff was relying. It is abundantly clear that the relation of bailor and bailee existed. It seems to me that the defendant has no defence whatever to the action by the bailor against him for the return of the goods. It seems to me that the District Court Judge was right, and that this appeal must be dismissed with costs.

CHUBB, J.: I concur. The first document is clearly a bill of sale within the meaning of the Statute. It is an inventory of chattels with receipt thereto attached. There is no doubt about that. Possession was retained by the grantor. *The Bills of Sale Act of 1891* came into force on the 1st January, 1892. This document was not registered on or before the 1st April, 1892. Consequently, if there was nothing more in the case, on the authority of *Leslie's case* the bill of sale would have been inoperative under section 7 of the Statute, and the defendant having got possession would have been able to keep it. But that is not all the case. There was set up certain facts which raised an estoppel, or which were said to raise an estoppel, and these were:—that he agreed in August, 1891, to hold the property for the grantee. I do not think it was a condition of the bill of sale or mortgage. My brother Harding says he thinks it was an absolute bill of sale. I think that the defendant agreed in August, 1891, to hold the property as the property of the grantee. I believe that when the proceedings for liquidation were taken that he got himself put into possession under that document for the purpose of preventing the trustee from making any claim to the property; that he did so in order to secure the property for himself; and he agreed to hold the property for the grantee. Then he says:—"Although I had agreed to do that, it was not binding on me, because since then the property," as he contended, "having vested in the trustee on

the liquidation, he has brought out the trustee's right, and can therefore hold them either as purchaser or for the real owner." It seems to me on the authorities that that cannot be. It would be inequitable, because I can conceive a case where the title to property might depend entirely and only on the possession of the property, and a person by a trick or a piece of base conduct could get possession. On the authorities cited by the learned Attorney-General, I think that the relation of bailor and bailee was created between the parties, and that the mere fact that the bailee afterwards got, or attempted to get, a title from the trustee could not be set up as an estoppel. I would point out that when he offered to purchase from the trustee the trustee's right, he distinctly told him:—"I am in as bailee." The trustee did not claim the property. All he did was to say—"if I have any title, you can have it for two guineas." I do not think that that amounted to the trustee electing to take upon himself the ownership of the property. The trustee did not claim that this was property under the insolvency. He may by a course of conduct have abandoned his title. He may have acquiesced in the fact of Echlin's possession for the grantee up to this time He allowed him to remain until he was debarred by his conduct from coming in and setting up this title. Therefore, for the reasons given before by myself and my brother judges, I think that the appeal should be dismissed. I think if ever there was a case in which the Court should endeavour to assist the plaintiff, this is one. I agree that the appeal be dismissed with costs.

Solicitor for plaintiff: *Bunton*.

Solicitors for defendant: *Thynne & Macartney*.

THE QUEEN (ON THE RELATION OF MACARTNEY) *v.* MOFFATT.

Local Government—Election—Ouster—Returning Officer—Nomination Paper—51 Vic., No. 7, ss. 26, 43, 53.

A rule *nisi* had been obtained calling on certain persons elected to show cause why they should not be ousted from office. The respondents gave notice before the rule was granted that they would not claim the office, and appeared to protect themselves from costs.

A majority of the Court was of opinion, on a motion to make the rule absolute, that the validity of the election should be decided, although both sides were agreed that the election was not properly made.

The returning officer appointed a deputy, who rejected certain nomination papers, because one of the nominators had not paid his rates, and one of the nominators had not signed the nomination paper. The candidates duly nominated did not exceed the number required, and were declared duly elected.

Held, by Griffith, C.J., and Chubb, J. (Harding and Cooper, JJ., *dissenting*), that the deputy having really acted at the election, the defect in his appointment was cured by section 53 of *The Divisional Boards Act*; that, if the rejected nomination papers had not been rejected, the election could have afterwards been declared void; that no injustice had been done by such rejection; that the respondents had been duly elected, and that the rule must be discharged with costs.

A nomination paper must be signed by the nominators.

If a returning officer rejects invalid nomination papers, the election will not be avoided on that ground.

Harding and Cooper, JJ., considered the respondents' admission that there was no election amounted to an admission that they were unduly elected, and that the rule should be made absolute by default.

Per Cooper, J.: The returning officer was irregularly appointed, and the proviso to section 53 extends to the whole section.

MOTION to make absolute an order *nisi* calling upon R. G. Moffatt, T. S. Beattie, and George Hatfield, to show cause why they should not be ousted from the office of membership of the Broadsound Divisional Board, on the grounds (1) that the returning officer was not duly appointed; (2) that the returning officer had no power to reject nomination papers of other candidates; (3) that the nomination paper need not be signed by the nominator himself. The relator was a ratepayer in the Broadsound Divisional Board. In January there were elections for three subdivisions of that Board. The chairman appointed John Cook as his substitute to act as returning officer. He was not prevented from acting by illness, or any other cause allowed under *The Divisional Boards Act*. Cook acted and rejected certain nomination papers. The remaining candidates were declared duly elected.

Byrnes, A.G., and *Shand*, for the relator, to move the rule absolute.

Lilley, for the respondents, did not show cause, but contended he was not responsible for costs. The rule ought not to have been granted. Instead of pointing out the matter to the Governor-in-Council the relator had obtained an expensive rule. We say there has been no election.

Byrnes, A.G.: We are both agreed on that point. [GRIFFITH, C.J.: I should like to hear the matter argued. Your agreement may be wrong.] Where a rule *nisi* is obtained in the absence of the other side, it is the practice of the Court, out of respect to the judge who granted the rule, to make the rule absolute. [GRIFFITH, C.J.: I have never known of such a rule.] The chairman of the Board should have acted as returning officer. He appointed Mr. Cook as his substitute. The circumstances did not exist which would allow the chairman under the act to delegate his duties. The returning officer was unduly appointed. 2. He had no power to reject the nomination papers. [GRIFFITH, C.J.: Do you contend that although if there had been a poll, and the respondents had not been elected, they would have been entitled to a rule to oust the candidate improperly nominated and then to have themselves admitted, and this Court must nevertheless turn them out?] Yes. Otherwise it is in the power of the returning officer to reject any nomination paper brought before him, and tell the rejected candidates they could appeal to the Court. He must restrict himself to saying whether a nomination is in form. He should not be able to say "you have not paid your rates," and make us come here to prove that we have. [GRIFFITH, C.J.: You say the other man should be put to the expense of coming here to prove the undisputed fact that you had not paid them.] One of the nominators did not sign his name with his own hand. A father was present and authorized his son to sign the nomination paper for him. The returning officer said it was not his signature, rejected the nomination without a hearing, and without any objection being taken by the other candidates. [GRIFFITH, C.J.: Is a returning officer bound to accept a nomination paper if he knows the signature is not a genuine one?] The returning officer's duties are ministerial. He cannot assume a judicial function. The signature was sufficient. *Reg.* v. *Justices of Kent*, L.R. 8, Q.B. 305; *France* v. *Dutton* (1891), 2 Q.B., 208.

Lilley: The respondents gave notice, before the rule was granted, that they would not claim the office. A letter was written by Hatfield to the Colonial Secretary. The rule should not be made absolute with costs.. The respondents should get their costs.

GRIFFITH, C.J.: I think the Court before making the rule absolute is bound to see that the respondents were not duly elected. The office of a boardsman is as public as that of a member of Parliament. I am disposed to think there was a valid election. I invite Mr. Lilley by any arguments he can make use of to assist the Court, as it is a matter of public importance.

Lilley then as *amicus curiæ* referred to section 26 of *The Divisional Boards Act*; *R.* v. *Tart*, 1 El. & El., 618; *Hyde* v. *Johnson*, 2 Bing., N.C., 776; *Maxwell's Interpretation of Statutes*, 2nd edition, 88. The declaration of election must be by a person "duly appointed." No person was duly appointed. Whether there was an election or not there could not be an ouster.

HARDING, J.: Can you show any authority, Mr. Attorney, that the Court ever follows a matter up if one of the parties gives in?

Byrnes, A. G.: That is the rule of the Court. *Reg.* v. *Lane*, 3 Q.L.J., 66. There the respondent thought to get out of costs by resigning, but the Court made the rule absolute with costs.

GRIFFITH, C.J.: The rule *nisi* was granted by Mr. Justice Real, and when it came before the Court it was not opposed by the respondents, who were alarmed by the fact that if they were unsuccessful they might have to pay the costs. That, however, ought not to prevent the Court discharging its duty if, when the actual facts are presented to its knowledge, it appears that the election is valid. If that were not so, persons duly elected under *The Divisional Boards Act* might be turned out of office merely because, as has been suggested

in the course of the argument, they are afraid to resist for fear of the costs, which nearly always follow the event. I do not think the Court should declare an election invalid when it is not invalid, simply because its validity is attacked and not defended. In the present case several objections have been taken to the election, the first being that the person who acted as returning officer was not duly appointed. The facts are that the chairman of the board thought he could not be present to act, and so deputed someone else to act in his stead. The election was accordingly held, and the person so acting declared the result. It was objected that he was not duly appointed; and, perhaps, he was not, but I think that we are precluded, by section 53, from entertaining that objection at all. The first paragraph of that section is a transcript of s. 85 of *The Elections Act of 1885*, and almost a transcript of s. 114 of *The Local Government Act of 1878*, and I think it has the same meaning in all three Acts. Its meaning in the other two Acts it not open to argument. A point was also raised whether chairmen of divisional boards are, under s. 38, *ex officio* returning officers. I think section 53 of the Act disposed of that point. With regard to the other objections, it appears on the proceedings before us that in each case in which the returning officer rejected a nomination paper a fatal objection to it existed in point of fact. Assuming that the returning-officer was wrong in deciding that fact, but still he arrived at a right conclusion, and the Court is now asked to upset the election of and to oust the only candidates who were duly nominated. I think that such a decision would be manifestly unjust. That objection, I think, also fails. I think I am in a position to state that the practice of divisional boards for many years has been to do as has been done in this case. Where a nomination paper which is bad has been put in, it has been the practice to reject it, and this practice has saved much unnecessary litigation. The other point, as to the sufficiency of the signature, is a question of greater difficulty. But I agree with the decisions given in the case of *The Queen* v. *Cowper*, 24 Q.B.D., p. 60, and in the case of *The Queen* v. *Tart*, previously referred to, and think that objection must fail also. On the whole I think the three gentlemen in question were duly elected; whether they thought so or not does not matter. I think the order should be discharged.

HARDING, J.: I think the judgment should go by default, as the case has been argued all from one side. True, Mr. Lilley has argued as *amicus curiæ;* but not without having costs at his back. I think the judgment should be entered by default.

COOPER, J.: I agree with the judgment which has been delivered by Mr. Justice Harding, and add that I think the relator is entitled to our judgment. I think on the whole case that these persons in question were unduly elected, and that Mr. Cook was improperly appointed. I am of opinion that the proviso to section 53 extends to the whole section. In my opinion the rule should be made absolute, without costs.

CHUBB, J.: I concur with the judgment delivered by the Chief Justice. In the present case the relator has not been able to show that these persons have been unduly elected, and therefore fails. I think the rule should be discharged with costs.

GRIFFITH, C.J.: The rule will be discharged with costs. I think all the members of the Court are of opinion that the respondents should not pay the costs, but that they should get them.

Solicitors for relator: *Thynne & Macartney.*

Solicitors for respondents: *Rees R. Jones & Boland.*

IN CHAMBERS.

GRIFFITH, C.J. March 20th, 1893.

In re LOUISA MAUDE STEWART, AN INFANT.

Practice—Infant—Next friend—Company.

A Joint Stock Company cannot be a next friend.

APPLICATION by The Queensland Trustees Limited, a Joint Stock Company registered in Queensland, as next friend of the infant, to be appointed guardian of the infant.

St. Ledger, in support of the application.

GRIFFITH, C.J., was of opinion that a Joint Stock Company could not be a next friend, and made no order on the application.

Solicitors: *Lilley & O'Sullivan.*

GRIFFITH, C.J. June 9th, 1893.

CLARKE *v.* CLARKE.

Foreign judgment—Common Law Practice Act of 1867, s. 22—Service of summons out of the jurisdiction.

A summons under s. 22 of *The Common Law Practice Act of 1867* cannot be served out of the jurisdiction.

APPLICATION for a summons under sec. 22 of *The Common Law Practice Act of 1867*, the judgment on which it was founded being a decree for costs in a matrimonial cause in the Supreme Court of New South Wales.

It appeared by the evidence that the judgment debtor was not within the jurisdiction of the Supreme Court of Queensland.

Bannatyne, in support of the application.

GRIFFITH, C.J., referred to *in re Busfield* (32 Ch. D., 123), and was of opinion that a summons under *The Common Law Practice Act of 1867*, sec. 22, could not be served out of the jurisdiction. He therefore refused the application.

Solicitors: *Thynne & Macartney.*

HARDING, J. 10th and 19th July, 1893.

In re THE ROYAL BANK OF QUEENSLAND LIMITED.

Company—Winding up—Arrangement with creditors—Meeting—Notice—Sanction of Court—Irregularity in compliance with order—53 Vic., No. 18, s. 35.

After a petition for winding-up the Royal Bank, a summons was issued for an order to convene a meeting in Queensland, and another in London, for considering and approving a proposed arrangement. The summons asked that the dates of the meetings might be fixed for London on 22nd June, and for Queensland on the 27th, and that at least twenty-one days before the days appointed, advertisements convening the meetings should be inserted in specific newspapers. The order was made accordingly. It appeared that there was not time to advertise in London twenty-one days before the meeting, and the meeting was advertised on the 15th and 16th June. The scheme of arrangement and notice of the meeting were posted to creditors. Several of the advertisements in Queensland were inserted within twenty-one days before the meeting. The scheme was carried unanimously at the meeting in Brisbane, and in London with one dissentient. On a petition to sanction the scheme of arrangement it was objected by a creditor that the meetings had not been properly held.

Held, that as the meeting had been held the Court had no power to vary the time of holding the meeting; that the strict performance of the order being a statutory condition precedent to the holding of the meeting, the petition must be dismissed with costs against the petitioners. The hearing of the winding-up petition was adjourned.

In re Alabama New Orleans Railway Co. (1891), 1 Ch., 213, followed.

PETITION to sanction a scheme of arrangement between the Royal Bank of Queensland Limited and its creditors.

The petition for the winding-up was heard along with the petition for sanction. Affidavits were read as to the publication of advertisements in London, Edinburgh, and Dublin. The order directed the advertisement to be inserted in certain newspapers twenty-one days before the meetings.

Lilley, and *Macgregor*, for the provisional official liquidators; *MacDonnell*, for the petitioning creditor; *Shand*, for T. M. Hall, a creditor; *Wilson*, for the bank; *W. A. D. Bell*, for the Crown, a creditor.

HARDING, J.: I am not satisfied that the meeting in London was advertised twenty-one days before the meeting was held.

Lilley: That is unnecessary. Twenty-one days' clear notice was never intended. A reasonable notice was sufficient. The order was obtained on 1st June, and it was impossible to publish it in London on that date. The order was substantially complied with. Notices were sent to each creditor. The people who stayed away from the meeting are not entitled to consideration.

HARDING, J.: Can you give me any idea of what notice was given? You can send a telegram to ascertain what notice was given. Somebody

here must swear they believe the telegram. The belief must be *bona fide*.

The application was adjourned, Mr. Shand's costs being allowed. On the renewal of the application a request for a further adjournment, pending the passing of an Act by the Legislature, was refused.

HARDING, J.: The Royal Bank of Queensland being in course of being wound up by this Court, an arrangement was proposed between it and its creditors, and an application in a summary way was made by its provisional official liquidators to this Court for an order for meetings of its creditors under *The Companies Act of 1889*, section 35, which empowers this Court to order that meetings of its creditors "shall be summoned in such manner as the Court shall direct," and gives validity to the arrangement come to at such meetings if sanctioned by an order of this Court. The present application is for such sanction on the petition of the provisional official liquidators. A preliminary question has arisen as to whether the *meeting* has been properly held under these circumstances. On the 31st of May last a summons came on for hearing before me, asking for an order convening a meeting in Brisbane, and another in London, of its creditors for considering and approving a proposed arrangement, and that at least twenty-one days before the day appointed for such meetings certain advertisements should be published in Brisbane and Great Britain, specifying the newspapers in which the same should appear, and for other directions. It was found that under the rules of Court then promulgated these further directions could not then be given; the matter was adjourned till the next day, the 1st of June, with leave in the interval to amend the summons in respect of such directions. Before the summons came on, the first of June rules of Court enabling the further directions to be given were promulgated; the summons was amended and came on for hearing, and an order was made thereon accordingly. In the part of the summons relating to the summoning the meetings, amendments were made asking that the dates of the meetings might be fixed for London on the 22nd of June, and for Queensland on the 27th; and that at least twenty-one days before the respective days appointed for such meetings, advertisements convening the meetings should be inserted in certain newspapers, specifying them as in the original summons; and an order was made accordingly. The fact that specific days had been inserted for the holding of the meetings was not brought under my notice when making the order. Thereupon the petitioning solicitors cabled to London to their agents to insert the advertisements in the necessary papers, but did not inform them of the length of notice to be given. This cablegram did not arrive in London, and could not possibly have so arrived, in time to enable the necessary notice of twenty-one days to be given by advertisement or otherwise, it only having arrived there on the 2nd. The agents in London not knowing of the notice required by the order convening the meeting, and after great delay in negotiations, consulted counsel, and otherwise ascertained that seven days' notice by posting notices was the time usually required by the Court in England under similar circumstances They then issued advertisements in proper form in the newspapers directed, in one on the 15th, and the others on the 16th of June. They posted to the creditors the scheme of arrangement on the 10th, notice of the meeting on the 15th, and of the adjourned meeting on the 30th, all out of time as said to exist by the practice in England. Such is the compliance with the order in England. Now as to Queensland. With respect to the advertisements ordered, they were not inserted in the papers published in Charters Towers before the 8th, Croydon the 16th, Rockhampton the 7th, and Townsville the 8th; all late. It has been said that notices of the meeting have been sent to all the creditors in Queensland. So far as the affidavits go they show posting of these notices on divers dates varying between June 3rd and 8th inclusive, and that 655 notices were posted on and after June 7th—too late at all events; and that 971 were posted before the 7th. That such should

be done was no part of the order, and had it been there would have been a failure to comply with the order in these 655 cases. At both the meetings the scheme of arrangement was carried, unanimously in Brisbane, in London with one dissentient vote. Figures were gone into in the argument to show that a different result would not have been obtained had all the creditors been present. I incline to agree with this assumption so far as the value is concerned, but as there was upwards of £50,000 not represented, the owners of that capital might have been amply sufficient to swamp the majority in number. At the same time it is possible that it might not have been so. The preliminary objection is insisted on by Mr. Shand on behalf of a creditor having a *locus standi* on this occasion, in addition to the Court's duty to ascertain that the order has been carried out. The question for decision is—have the meetings which sanctioned the arrangement been held in accordance with the order? or in other words, has section 35 of *The Companies Act of 1889* been complied with? The case of *in re Alabama, &c., Company*, 1891, 1 Ch., 213, was cited. It lays down that, in exercising the power of sanctioning a scheme of arrangement, the Court will ascertain that all the statutory conditions have been complied with. Lindley, L.J., p. 238, says:—"It is said that people do not look in the newspapers to see if there are any advertisements with reference to the companies in which they are interested, and there must be a multitude of persons who have never seen these advertisements at all. I think that is very likely, but still there is the statute, and what the Court has to do is to see, first of all, that the provisions of that statute have been complied with, and secondly, that the majority has been acting *bona fide*." At page 240: "Now, I could understand that a dissentient might say that in consequence of the shortness of the notice convening the meeting, in consequence of the complex interests of some of the majority, that meeting did not really represent the views of the debenture-holders. I can understand that, and I can understand that it might be reasonable to convene another meeting to ascertain whether the real bulk of the first debenture-holders were in favour of the scheme." Bowen, L.J., says at p. 245: "It is, in my judgment, desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of that class. It would be most unjust to bind creditors or classes of creditors by the decision of three-fourths in value of those who attend a particular meeting, unless you have secured that the meeting shall adequately represent the entire body. But the section makes no provision for that, except by enacting that the meeting is to be held in the manner in which the Court shall direct. That, to my mind, throws upon the chief clerk"—here, I am the chief clerk—"the responsibility of seeing, when a proposal is brought before him by persons who are interested in carrying it through, that adequate notice is given to the body of creditors, who might otherwise know nothing about the matter. If I had been looking alone at this order, which was made by the chief clerk, I confess I should have had considerable doubts whether it was reasonable to bind the whole body of debenture-holders by a meeting as to which the only notice given was that which was indicated in the order. This is a matter about which the Court ought to be watchful. There may be circumstances which would make it unsafe to act on the conclusion of a meeting, although the conclusion was both emphatic and distinct." Fry, L.J., says at page 247: "I shall not attempt to define what elements may enter into the construction of the Court beyond this: That I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with." It was argued that compliance with the order, so far as the English creditors were concerned, was impossible, and that this Court has now power to rectify by waiver all the irregularities in compliance with the order. I know of no such power' the meeting having been held. None of the cases

cited by Mr. Lilley went to show that *ex post facto* the Court ever acted. In everyone of them relief was given before. The giving such power to the Insolvency Court by section 179 of *The Insolvency Act* supports the argument that it did not exist in the Supreme Court. Assuming that, so far as the English creditors were concerned, the performance of the order to advertise twenty-one days before the meeting was impossible, it might be contended that it was to that extent a nullity, and that what the Court had ordered was the holding of a meeting on the 21st, preceded by notice advertised a reasonable time before. It is not necessary to decide that this is the true contention of the order, since, were it so, it has been seen that the advertisements and notices in England were less than those usually required in that country by the Courts there. In other words, I should have to hold that less than was usually required in that country was sufficient, and that in numerous cases less than three days, as shown by the evidence, was a sufficient time for inquiry and deliberation before acting by the creditors. With regard to the creditors in Queensland, there was ample time to comply with the order. But it was not done. and, except by proxy, it was impossible for a Croydon creditor to take part in the meeting. The meeting was for discussion, deliberation, and decision by voting. One creditor prevented by the shortness of the notice might have had such knowledge that, had he asked a pertinent question, its answer might have changed the result of the voting. It is shown that a large number of creditors had not this opportunity. Another view is that obedience to the order being impossible the order itself was void. If that was so, the meeting would be a nullity. I think that before the meeting was held the Court had ample power to vary the time for publication of the advertisements, but that, after the meeting, the Court has not power to do so, the strict performance of the order being a statutory condition precedent to the holding of the meeting, and that all it has to do after the meeting is to ascertain whether the meeting has been held in accordance with the order. As the order was made it has not been complied with either in England or Queensland, without any excuse as to Queensland. As to England, suppose it to bear the interpretation that advertisements were to be published a reasonable time before the meeting, yet it has not been complied with by issuing them within the time usual in that country. Assume the order void, and the meeting is void. On the whole, therefore, the meeting cannot be sustained, and the petition for sanction must be dismissed with costs against the petitioners. The winding-up petition is adjourned till the 4th August.

Solicitors for Bank: *Chambers, Bruce & McNab.*
Solicitors for petitioner: *Bernays & Osborne.*
Solicitors for T. M. Hall: *Thynne & Macartney.*

BRISBANE CIVIL SITTINGS.

GRIFFITH, C.J. 23rd, 26th, 28th, 30th August, and 1st September, 1893.

HORSLEY *v.* DUNLOP.

Will — Probate in solemn form — Testamentary capacity — Undue influence — Costs out of estate.

James Dunlop, aged eighty years, by his last will, bequeathed all his property to his wife and step-daughter, but left nothing to his grandson, his only lineal descendant. He had frequently stated his intention of making his grandson his heir, and had made several wills in his favour. The grandson, by his mother, as next friend, alleged incapacity on the part of the testator, and undue influence by his wife. The jury found in favour of the execution of the will, and that there was no proof of undue influence. The defendant asked for costs out of the estate.

Held, that the question of costs is in the discretion of the Court, and that there are two main rules in guiding the Court. (1) The Court must consider whether, having regard to all the circumstances of the case, the parties who have unsuccessfully opposed probate were led reasonably to the honest belief that there was good ground for impeaching the will. If they were not, the costs of the unsuccessful litigation must fall on them as in other cases. But, if the facts were such as to lead them reasonably to that belief after proper inquiries, a further question arises, namely, (2) whether this belief is to be ascribed to the con-

duct of the testator himself, or of the persons deriving the substantial benefit under the will, so that such conduct may properly be considered as the cause of the reasonable litigation which has occurred as to the validity of the will. If this question is answered in the affirmative, the costs of the litigation should come out of the estate; if in the negative, each party must bear his own costs.

Held also, that, on the circumstances of the case, the next friend was reasonably led to form an honest belief that there was good ground for impeaching the will on the ground of incapacity, and that this belief must be ascribed to the conduct of the testator, and that the costs of all parties should come out of the estate, but that the defendant's costs should be taxed as between party and party, as there was no reasonable evidence adduced of undue influence.

ACTION for probate in solemn form of the will of James Dunlop. The defendant, by his next friend, pleaded undue execution, testamentary incapacity, and undue influence on the part of the testator's wife. The jury found in favour of the plaintiffs, the executors of the will, and that there was no evidence of undue influence. The facts are fully set out in the judgment.

Byrnes, *A.G*, and *Feez*, for the plaintiffs.

Power, *Lilley*, and *Gore-Jones*, for the defendant.

Byrnes, *A.G.*, moved for judgment, and that the defendant be ordered to pay the costs of the action.

Power asked for costs out of the estate. The surrounding circumstances justified an inquiry. The jury practically disagreed on the finding as to undue influence. The grandson was mentioned as heir in all previous wills. Costs were allowed out of the estate, under similar circumstances, by Harding, J., in *Wenzell* v. *Lyons*, 23rd November, 1885; and by Owen, J., in *Brown* v. *McEncroe*, 11 N.S.W. L.R. (E.), 134; *Davies* v. *Gregory*, 3 P. & D, 28; *Symons* v. *Tozer*, 3 Notes of Cases, 41; *Orton* v. *Smith*, 3 P. & D., 23; *Cousins* v. *Tubb*, 65 L.T., 716, were also discussed.

Lilley followed. The true principle is to be found in *Davies* v. *Gregory*, and is: Has the testator, by reason of his conduct, caused the reasonable litigation which has occurred after his death as to the validity of his will? Mrs. Dunlop had no other course open to her in the interests of her son. The Court regards with favour a next friend. The testator's conduct necessitated the action.

Byrnes, *A.G.*: Costs should be paid by the defendant. The defendant, by reasonable inquiries, could have ascertained that the will was properly executed. If costs are granted no man will be safe in altering his will. His estate will always run the risk of being penalized to the extent of the costs of proving the will. The grandson was provided for by a nomination of trust. As a general rule, when the plea of undue influence failed, the party making the plea is condemned in costs. *Ireland* v. *Rendall*, 1 P. & D., 194; *Broadbent* v. *Hughes*, 20 L.J., P. & M., 134; *Summerell* v. *Clements*, 3 Sw. & T., 35.

C.A.V.

GRIFFITH, C.J.: The plaintiffs propounded, as executors, the will of James Dunlop, dated January 29th, 1890. The defendant, a child of six years of age, is his grandson and only lineal descendant The defence put in on behalf of the defendant raises the issues of the due execution of the will, the testator's testamentary capacity, and undue influence alleged to have been exerted by his widow. The jury have found all necessary facts in favour of the plaintiffs. I have now to decide upon whom the costs of the litigation are to fall. The plaintiffs ask that the defendant may be ordered to pay the costs of the action; and on behalf of the defendant it is asked that his costs may be paid out of the estate, or that, at all events, he may not be ordered to pay the plaintiffs costs The rule as to costs prescribed by *The Judicature Act* is, that in actions tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the judge before whom the action is tried otherwise orders. I think that the term "good cause" means the existence of such circumstances that it is fair and just as between the parties that the costs should be disposed of in some other way (see *Forster* v. *Farquhar*, 1893, 1 Q.B., 564). In testamentary causes it has long been the practice of the Court to consider all the circumstances of

the case, and not to act on the assumption that the losing party is necessarily in the wrong. "It is," in the words of Lord Penzance, in *Matthews* v. *Gard* (33 L.J., P. & M., 7), "the function of the Court to investigate the execution of a will and the capacity of the maker of it, and, having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question a judicial inquiry is in a manner forced upon us. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong even if they do not succeed." To quote again from the same judgment: "It is of high public importance that doubtful wills should not pass easily to proof by reason of the cost of opposing them. It is of equal importance that parties should not be tempted into fruitless litigation by the knowledge," or, I would add, expectation "that the costs will be defrayed by the estate of the testator." The matter is undoubtedly one for the discretion of the Court, but, for the reasons *which I* have given, it is plainly very desirable that that discretion should be exercised in accordance with definite and known rules, so far as the exercise of judicial discretion can be guided by fixed rules. From the cases I think the following rules can be deduced: 1. The Court must consider whether, having regard to all the circumstances of the case, the parties who have unsuccessfully opposed probate were led reasonably to the honest belief that there was good ground for impeaching the will. If they were not, the costs of the unsuccessful litigation must fall on them, as in other cases. But if the facts were such as to lead them reasonably to that belief, after, of course, proper inquiries, a further question arises, namely: 2. Whether this belief is to be ascribed to the conduct of the testator himself, or of the persons deriving the substantial benefit under the will, so that such conduct may properly be considered as the cause of the reasonable litigation which has occurred after the death of the testator as to the validity of the will. *Davies* v. *Gregory*, L.R., 3 P. & D., 28. If either branch of this question is answered in the affirmative, the costs of the litigation should come out of the estate; if in the negative, each party must bear his own costs. I proceed to apply these rules to the present case. The testator, at the date of his will, was about eighty years of age. At the time of his death his property consisted of about £8,000 in cash, and some real property apparently not of very great value. By his will he gave to his wife, whom he had married in December, 1879, the house in which he was then living, with the furniture and a sum of £200. To his step-daughter, Mary Kenny, he gave a legacy of £200. He gave the residue of his property, after some other legacies of small amount, to his wife and stepdaughter in equal shares. He gave nothing by his will to his grandson, the defendant. He had, however, in February, 1885, conveyed to trustees a piece of land in George Street, Brisbane, upon trust for himself for life, with remainder to his only son, John, the father of the defendant. This property at the date of the will was estimated by the testator to be producing about £5 10s. a week in rents John Dunlop died in 1887, at which time the testator expressed his intention of making his infant grandson his heir. Between that time and the date of the will in question he had made several wills, all of which were prepared by Mr. Mayne, who was for many years his solicitor, and in each of which, with one exception, he had given the residue of his estate to the defendant. In the exceptional case, a will which was made in June, 1888, on the occasion of a quarrel with his wife, when he left her and went to Sydney for some weeks, he left his residue to charities. In all these wills he gave legacies of varying, but small, amounts, to his wife and to his step-daughter, and gave the house in which he was living at the time, with the furniture, sometimes to one, and sometimes to the other of them. He appears to have always entertained the warmest affection for his grandson, and often said in conversation that he would make him his heir. For some time after the son's death a rivalry seems to have existed between the widow and Mrs. John Dunlop, and the testator appears about the same

time to have entertained feelings of jealousy (which seem, however, to have been quite unfounded) with regard to his wife, who, although not a young woman, was many years his junior. On two occasions at least, one in 1888, to which I have already referred, and the other in 1890, after the date of the will now in question, he left his house and remained absent for some time, giving as his reason, quarrels with his wife. The testator had, in addition to the settlement of the George Street property, given his son a farm at Pine River, containing about 650 acres, and a house and land at Albion, and had paid off a mortgage on the farm during the son's lifetime, who, however, mortgaged it afresh. The circumstances relating to the making of the will in question are, briefly, as follows: The testator went to Mr. Mayne and said he wished to make a fresh will. On his stating the amount of the legacy that he proposed to leave to his wife, which was of small amount, Mr. Mayne remonstrated with him, as he had often done before, and suggested that she should receive more than Dunlop proposed. On this the testator said he could see that his wife had been to Mr. Mayne, and had been influencing him. Whatever was the precise nature of Dunlop's suggestion or insinuation, Mr. Mayne became angry, and requested Dunlop to take his papers away, and go to another solicitor. Dunlop then left, taking the existing will with him, which was probably a few weeks old. A day or two afterwards, on Dunlop calling again, Mr. Mayne requested him to relieve him of the trusts of the George Street property, of which he was a trustee. Very soon afterwards Dunlop went to Mr. Bunton, who had known him for many years, but had never acted as his solicitor, and instructed him to prepare a new will, at the same time handing him the old one, and directing certain alterations in the legacies mentioned in it, and giving instructions as to the disposal of the rest of his property, including directions as to the George Street property, which he wished to leave to his grandson. He mentioned to Mr. Bunton that there was a nomination of trustees in connection with this property, which was in Mr. Mayne's possession. Mr. Bunton having sent for and obtained the document, pointed out to Dunlop that the property was already disposed of and could not be included in his will. Dunlop did not, however, alter the rest of his instructions, and the will was duly prepared and executed in accordance with them, after which it was taken by the testator to the Bank of New South Wales, his bankers, where it remained until his death. The widow says she was present while the instructions for the will were being given, but did not hear them, and did not know that the residue was left to her and her daughter. There was no evidence that the testator ever mentioned this will to anyone, and the widow says that she never knew of its contents. Dunlop appears after this to have continued to refer to his grandson in the same terms as before, and there was evidence that, about six or seven months later, he said that he had made his grandson his heir, and had left nothing to his wife, who, he said, did not care for him. With respect to the character of the testator, there was evidence that he was a hale, hearty, old man, capable of transacting and accustomed to transact his own business unassisted up to and after the date of the will, and that he was of an obstinate and secretive disposition, hard to persuade, and hard to change when he had made up his mind. On the other hand there was evidence that, before or about the date of the will, his mind showed signs of failing. It appeared that he occasionally drank to excess, and that he then became quarrelsome, but that he was often a total abstainer for months at a time. His widow says that the differences between him and herself arose from this failing. Mrs. John Dunlop, the defendant's mother, who is really the *actor* in this litigation, deposed that, on the occasion of a visit to the farm, a week or two before the date of the will, the testator appeared to be of perfectly sound mind, and Mr Mayne said that on the occasion of his quarrel with him he had perfect testamentary capacity. The foregoing is a summary of the facts as they appeared by the evidence, so far as they bear on the present ques-

tion. What, then, is the proper inference to be drawn from them as to the reasonableness of the litigation? On the one hand it is said that inquiries from Mr. Bunton and Mr. Mayne would have shown that there was no reason to doubt the testator's capacity, and that Mrs. John Dunlop herself knew of his capacity at or about the time in question. It is said further that there was no evidence of undue influence. On the other hand it is said that the sudden change in the testator's intention is unaccountable—that the will was not only inconsistent with all his previous dispositions of his property by will, but with his expressed intention, both before and after its execution, that the entire omission of any gift to his grandson, taken into conjunction with subsequent statements alleged to have been made by him, that the child was his heir, led to a reasonable suspicion that he did not intentionally make such a will, or did not remember that he had done so, and that these considerations, coupled with the great age of the testator, and the evidence of the feebleness of his mind about the date of his will, were such as reasonably to lead the defendant's mother to the honest belief that there was good ground for impeaching the validity of the will, and to justify her in the interests of her child in putting the plaintiffs to proof of the testator's capacity. The matter must, of course, be considered in the light of the facts, not as now found by the jury, but as they presented themselves to her. Under all the circumstances I have come to the conclusion that, notwithstanding her own opinion as to his mental capacity on the occasion of the visit to the farm, she was reasonably led to form an honest belief that there was good ground for impeaching the will on the ground of incapacity. Is, then, this belief to be ascribed to the conduct of the testator? for no question arises as to anything done by the residuary legatees. It is difficult to suggest anything else to which it can be ascribed. All the facts to which I have referred are matters personal to Dunlop himself. And I think the word "conduct," in the rule which I have above stated, must be taken to include all matters personal to a testator, as well as his acts or omissions. The defendant's costs of the action, so far as they relate to the defence of incapacity, ought, therefore, I think, in accordance with the rule of the Court, to come out of the estate. But I do not come to the same conclusion as to the defence of undue influence. In my opinion no reasonable evidence of undue influence was given, nor am I able to see any reasonable grounds for an honest belief that the will was impeachable on this ground. I do not think, however, that the costs of either party were appreciably increased by setting up this defence. If they had been, the additional expense ought to fall on the unsuccessful party, but under the circumstances I do not think it necessary to direct any apportionment. I therefore pronounce for the will, and order that the costs of both parties be paid out of the estate, the defendant's costs to be taxed as between party and party. I think that this last direction will protect the estate against any possible small increase of expense that may have been occasioned by the defence of undue influence. I may add that I have little doubt that, when the natural feelings of irritation caused by the present proceedings have passed away, the widow and her daughter will themselves be glad that the law has not diminished the infant defendant's estate by casting upon it the expense of this litigation.

Solicitors for plaintiffs: *Macpherson & Feez.*

Solicitors for defendant: *Thynne & Macartney.*

AUGUST SITTINGS OF THE FULL COURT.

SIMPSON *v.* FRASER.

Towns Police Act (19 Vic., No. 24), s. 10—Detinue—Identification of property—Judicial notice of locality.

Cordial manufacturers at Charters Towers used to supply hotels in turn, each for a month, it being the practice for the outgoing maker to take away at the end of the month all the bottles then empty, and leaving the full ones to be taken when empty by the incoming maker, who accounted to the outgoing maker for them. Complainant left certain full bottles at E.'s

hotel on 1st April, and defendant took them away in the usual course, but refused to deliver them to the complainant. The complainant obtained a summons under section 10 of *The Towns Police Act* for the delivery of the bottles, and an order was made accordingly.

Cooper, J., was of opinion that the bottles were not sufficiently ascertained to support an action of detinue and quashed the conviction, Chubb, J., dissenting.

Griffith, C.J., and Harding, J. (Real, J., dissenting), affirmed the judgment of Chubb, J., and upheld the order of the magistrates. An action for detinue will lie for any certain property which it was the duty of the defendant to deliver to the rightful owner, and which was originally so specific as to be capable of description in the writ, notwithstanding that there might be an indefinite quantity of the same kind of things in existence in the same town or country.

The detention being wrongful, any subsequent mixing of the bottles with others did not discharge the defendant from his obligation to deliver.

The above statute affords relief in any case of detinue where the goods are still in possession of the defendant.

It is unnecessary to give formal evidence before justices of a locality with which they are familiar.

APPEAL from an order of the Northern Full Court quashing an order of magistrates at Charters Towers.

Feez, for appellant; *Lilley*, for respondent.

The facts appear from the judgment.

GRIFFITH, C.J.: In this case the complainant obtained an order under section 10 of 19 Vic., No. 24, one of *The Towns Police Acts*, for the delivery to him of about fifteen dozen soda-water bottles of specified kinds, which he alleged were wrongfully detained from him by the defendant. On an application to the Northern Court for a quashing order, Cooper, J., was of opinion that the bottles in question were not sufficiently ascertained and distinguishable to be the subject of an action of detinue, or of a proceeding under the statute. Chubb, J., was of opinion that there was evidence from which the magistrate could find that the bottles were sufficiently ascertained and distinguishable. The magistrate's order was, therefore, quashed, and the present appeal is from the quashing order. Complainant and defendant are cordial manufacturers. The case made by the complainant before the magistrate was briefly as follows:—That it is the practice at Charters Towers for the several cordial makers to supply the hotels in turn, each for a month, the outgoing maker taking away at the end of his month all the bottles then empty, and leaving the full ones to be taken when empty by the incoming maker, who accounts to the outgoing maker for them; that, on the 1st day of April last, complainant, who had been supplying Earl's Hotel for the month of March, left the bottles now claimed at the hotel, they being then full, and that defendant in the ordinary course took them away when empty, and refused to deliver them to the complainant when demanded. I think there was evidence to support the case so put forward. But in that view I should be disposed to think that the obligation imposed upon the defendant would have been satisfied by the delivery of any bottles of corresponding number and description, and that there was, consequently, no duty to deliver any specific bottles. There seems, however, to be some authority, to which I will refer later, for holding that an action of detinue would lie even in that case. But the case did not rest on the evidence for the complainant. The defendant himself gave evidence, from which, with the evidence for the complainant, the magistrate was, in my opinion, warranted in inferring that the bottles supplied by the defendant to the hotel were distinguished by a trade mark (whether a label or not is not stated), so that the defendant, when he took the bottles left by the complainant, could distinguish them from those supplied by himself, and further, that the defendant did not take the bottles by authority of the implied agreement to be inferred from the course of dealing, which he repudiated, but with the intention of depriving the complainant of them. There was some evidence that some of the complainant's bottles also had the defendant's trade mark on them, but I think that the magistrate was the judge of the weight and effect of this evidence. The question then is whether an action of detinue will lie for goods of such a kind taken under such circumstances. It is objected that there are at Charters Towers many thousands of bottles of the

kinds claimed, and that it is impossible to distinguish the bottles in question from others of the same kinds with which they have been or may have been mixed. And reliance is placed on the statement of the law in the old books—I take it from *Co. Litt.*, 286 b.—"In this writ (detinue) the plaintiff shall recover the thing detained, and therefore it must be so certain as it may be known; and for that cause it lieth not for money out of a bag or chest; and so of corn out of a sack, and the like; these cannot be known from other." I find, however, in *Fitzherbert, N.B.*, one of the authorities quoted in the margin of Coke, it is said (p. 138) "If a man bail £20 to rebail" (*i.e.*, delivers £20 to be redelivered) "detinue lies and account—otherwise if the agreement were to account for the money." Also "Detinue of four quarters of barley, and it doth not say in sacks, and yet good." In *Dyer's Reports* (fol. 29 b.) is a report of an action of detinue brought for forty quarters of wheat in the year 28, Henry VIII. The plaintiff declared simply on a contract for wheat. The defendant pleaded that the plaintiff bought eighty quarters on condition that he should pay for it as delivered, otherwise the contract to be void; that he had taken and paid for thirty quarters, and had taken ten quarters without payment, whereupon the defendant claimed that the contract was void It does not seem to have occurred to any one to doubt that the action lay. In *Rastell* v. *Draper* (*Yelv, R.*, p. 80, 3 James I.) it was held that, if on a sale of goods the contract was for payment in foreign money, the action should be in debt for the corresponding sum in English money, but it was said that, if the contract had been for so many ounces of foreign money, or for a bar of silver or gold, it could not be demanded by the name of money, "because it is not coin, nor is used in trade or merchandise" (which I understand to mean used as currency), "but then he ought to have a writ of detinue, and thereby he shall recover the thing or its value." In such a case the contract would be not for the delivery of a specific piece of silver or gold, but for the delivery of a specific kind of thing different from ordinary currency. It has been pointed out by old writers (see Fitz, N.B., *ubi supra*, Note) that debt and detinue may be considered as exactly analogous, with the difference that one is for the recovery of a chattel, the other of money (and see *Bryant* v. *Herbert*, 3 C.P. Div., 189, 389). And between them the two actions, debt and detinue, appear (with the action of covenant) to have covered all cases of wrongful withholding of money or goods. The gist of each action was the withholding (Ch. Pl., 7th ed., 137, *Imack* v. *Clark*, 2 Bulstr., 308). In the action of detinue, moreover, damages for the detention could be recovered, which might be of considerable amount (*Dreyfus* v. *Peruvian Guano Company*, 42 Ch. D., 66, 75). It does not appear to have been settled until of comparatively late years that such damages can be recovered in an action for conversion. I think that the authorities to which I have referred show that the general statement of the rule as quoted from Coke requires qualification, and that an action for detinue would lie for any certain property which it was the duty of the defendant to deliver to the rightful owner, and which was originally so specific as to be capable of description in the writ, notwithstanding that there might be an indefinite quantity of the same kind of things in existence in the same town or country. In the cases put in the old books of money (not being specific coins, or corn not separated from other corn, as in a sack), no such duty would arise, and the action would not lie. Can it then make any difference to a plaintiff's form of action that the defendant has, by his subsequent acts, rendered the property incapable of identification? In the case of *Reeve* v. *Palmer* (5 C.B., N.S, 84, 91, 27 L.J., C.P. 327, 28, Ib. 168) it was held that a loss of the goods sued for was no answer to an action of detinue, the reason given being that it does not lie in the defendant's mouth to set up his own wrongful act or omission as an answer to an action. I think this principle is of general application. To apply these rules to the present case—I think that, upon the evidence, the magistrate might properly find that the defendant,

when he took the bottles, ought to have delivered those same bottles to the complainant, and that his detention of them was wrongful. And I think that any subsequent mixing of them with others, if it took place, does not discharge him of this obligation. Whether on the authority of the case in Yelverton this form of proceeding could have been maintained on the case as it rested on the evidence for the complainant alone it is not necessary to determine, although I am disposed to think that it could not. I think that the relief given by the statute was intended to be afforded in any cases in which an action of detinue would lie, and in which the goods are still in the possession of the defendant. As to whether it could be given after the goods have passed from his possession I express no opinion. I think that the objection as to jurisdiction fails for reasons given in the course of the argument. It was decided in the case of *ex parte Cramb* (1 Q.L.J., 81) that it is unnecessary to give formal evidence before justices as to the precise locality of a place with which they are familiar, and the situation of which everyone in Court, and everyone concerned in the case, perfectly well knows. See also the passages which I read from *Mayor of London* v. *Cox* (L.R., 2 H.L., pp. 262, 283). It would be absurd if, in a case tried in this Court, evidence should be required to be given of the situation of Lennon's Hotel—that Lennon's Hotel is in George Street, that George Street is in the municipality of Brisbane, and that Brisbane is in the colony of Queensland. I am therefore of opinion that the order of the magistrates was right, and that the appeal must be allowed.

HARDING, J.: I concur with the judgment which has been delivered by The Chief Justice.

REAL, J.: I agree in all respects with the law as laid down by The Chief Justice. If anything I would be inclined to extend it a little, and if it made any difference I would probably require further argument before I could decide in favour of the proposition that, if an article is capable of distinction in itself as a specific article, the mere fact that there are a large number of other articles of precisely the same nature deprived a man of his right of having the same quantity delivered back to him in case they were mixed. But we have to look at the evidence. The ground for the judgment which has been delivered is that the bottles at the hotel were distinctly marked, and capable of identification, and that, knowing which was which, he took them when they were empty without the intention of giving them back again, that being a wrongful act. If that were so I would consent to the judgment. I also hold that nothing which was done afterwards made any difference. Nothing could relieve him of the responsibility. But when I look at the evidence a difference arises between myself and my brother judges. I am not prepared to draw the inference. It seems to me to be the evidence of the witnesses that when they were brought to the hotel they were full and capable of being distinguished. But I see no evidence to show that when they were taken away they could be distinguished. If it was incumbent upon the defendant to show that they could not be distinguished, then it has not been done; and if it was incumbent upon the plaintiff to show that they were capable of being distinguished, I cannot see anything in the evidence. Therefore I think the appeal should be dismissed, but without costs. I should be sorry to see anyone deprived of the right of appeal in any Court, but the present matter is of so trivial a nature, with no further right dependent upon the result, there being no question of malice, no trying of a question of right to much higher property, but simply a question of the form of action, I do not think the matter should have gone so far. It is merely a question as to whether it was the proper form of action to recover £4 worth of property. I think it as near an abuse of the practice of the Court as it very well can be. Of course, when I talk of abusing the rights of the Court I refer to the respondent. It was the respondent who was fighting against the form of action. It seems he owed the money and admitted it, but that they did not sue him in the right way.

GRIFFITH, C.J.: The appeal will be allowed with costs.

Solicitors for appellant: *Bernays & Osborne;* agents for *Dwyer.*

Solicitor for respondent: *Helicar;* agent for *Marsland & Marsland,* Charters Towers.

GRIFFITH, C.J. August 4th, 1893.

In the matter of The Trustees and Incapacitated Persons Act, and in the matter of A PETITION BY JAMES CAIN.

Trustees and Incapacitated Persons Act, sections 25, 43—Real Property Act of 1861, s. 60—Real Property Act Amendment Act of 1877, secs. 48, 49, 51—Repealing Act of 1867, s. 8—Mortgage—Vesting order.

The word "interest" in the interpretation clause of *The Trustees and Incapacitated Persons Act of 1867* is of general application, and not limited to an interest in land as distinguished from a "security" upon lands under *The Real Property Acts.*

PETITION praying for an order discharging certain lands from a Bill of Mortgage under *The Real Property Act of 1861.* The land in question had been mortgaged by the petitioner in 1865 to a building society, established under the repealed Act, 11 Vic., No. 10. The mortgage debt had been paid off, but the instrument of release, if it was ever executed, was lost, and had never been registered. The building society had long since ceased to exist, and there appeared to be no one in existence who could execute a fresh release.

Foxton, for the petitioner, referred to section 25 of *The Trustees and Incapacitated Persons Act of 1867.*

GRIFFITH, C.J., was of opinion that upon this state of facts the Court would have jurisdiction to grant relief either under section 25 or under section 43 of *The Trustees and Incapacitated Persons Act of 1867,* if the term "lands" in those sections included the interest of a mortgagee under *The Real Property Acts.* He referred to the interpretation clause (sec. 1), by which the term "land" includes "any interest in any tenement or hereditament of what kind or tenure soever," to section 60 of *The Real Property Act of 1861,* and sections 48, 49, and 51 of *The Real Property Act of 1877,* and to section 8 of *The Repealing Act of 1867,* and held that the term "interest" in the interpretation clause of *The Trustees Act* is of general application, and is not limited to an interest in land, as distinguished from a security upon land, under *The Real Property Acts* He therefore held that he had jurisdiction, and made an order vesting in the petitioner the interest of the building society in the mortgage.

Solicitors for petitioner: *Foxton & Cardew.*

IN CHAMBERS.

GRIFFITH, C.J. 11th September, 1893.

In re the lands and goods of CORBETT.

A joint grant of administration was made under s. 32 of 31 Vic., No. 9, to the widow and a creditor, there being special circumstances rendering such joint grant expedient.

EDWARD JOSEPH CORBETT died on the 19th July, 1893, intestate, leaving him surviving a widow and two infant children. The widow was unable to find sureties in the sum required to the administration bond, and she was desirous that a joint grant should be made to herself and William Francis Corbett, a brother and one of the principal creditors of the deceased. William Francis Corbett was willing to accept the joint administration for the purpose of protecting his claims as such creditor. A reduction of the usual amount of the bond by the amount of the widow's interest and the creditor's debt was also applied for. The Registrar had refused the grant.

Gore-Jones, on behalf of the petitioners, made application for the joint grant of administration to the widow and said creditor under section 32 of 31 Vic, No. 9, and referred to section 6 of the said Act, to which there is no corresponding section in the English Statute 20 and 21 Vic., c. 77; also cited the orders made by Lilley, C.J., in *the lands and goods of Hammond,* 13th July, 1886, and *in the case of Treweeke,* 18th June, 1890, and

available assets, valued at £25, were exhausted by a preferential claim for rent and law costs. Twenty creditors were present at the meeting, representing £773 6s. 1d. Four dissented from the resolutions, representing £168 3s. 4d. Thirteen of the assenting creditors voting on the resolutions were represented by the debtor's solicitor, and their debts amounted to £502 12s 9d. The resolutions passed were (1) that the affairs of the debtor be liquidated by arrangement and not in insolvency; (2) that A. S. Lang be appointed trustee; (3) that the trustee be empowered to sell the furniture of the debtor to him for £20; (4) that the debtor be granted his discharge forthwith; (5) that Messieurs Powers and Robinson be intrusted with the registration of the resolutions. All the resolutions except the third one were registered on 24th August, the Registrar considering that relating to the furniture *ultra vires*.

Feez, for Mrs. Cardew, a creditor, in support of the motion.

Lilley, for the debtor, to oppose.

Feez: The resolutions were passed in the interest of the debtor and not of the creditors. *Robson's Bankruptcy*, 4th edition, 760; *re Ash*, mentioned in *Roche and Hazlitt's Bankruptcy*, 432; *Ex parte Russell*, L.R., 10 Ch., 255; *Ex parte Staff*, 20 Eq, 775; *re Terrell*, 4 Ch. D, 293; *Ex parte Cobb*, *re Sedley*, L.R, 8 Ch., 727; *re Page*, 2 Ch. D., 323; *Ex parte Cowen*, L.R., 2 Ch., 563; *Ex parte Aaronson*, 7 Ch.D., 713; *Ex parte Williams*, 18 Ch.D., 495; *re John Callaghan*, *per* Lilley, C.J., 16th July, 1890. The discharge of the debtor amounted to a close of his insolvency, so that after-acquired property would not vest in the trustee. *Ebbs* v. *Boulnois*, L.R., 10 Ch., 479; and *re Bennett's Trusts*, 19 Eq, 245; L.R., 10 Ch., 490.

REAL, J., referred to section 167 subsection 2 of *The Insolvency Act*, and to the practice *in formâ pauperis*.

Lilley: The creditor not having objected before the Registrar has no *locus standi*. *Re Webb*, 2 Ch. D., 326. The resolutions were not passed in the interest of the debtor. *Re Hope*, 9 Ch. D., 398. As the debtor could get his discharge under section 167, sub. 2, the Court will not do what is useless.

Feez: This is not an appeal from the Registrar but an application under section 205, which differs from the English section.

REAL, J.: If *The Insolvency Act of 1874* had been the same as the English Statute, then, on the authority of the cases cited by Mr. Feez, I would have vacated the resolutions, but the principle of the cases cited seems to be that a debtor who has little or no assets cannot take the benefit of the Bankruptcy law. That is not so here. We have the *formâ pauperis* procedure. If I were to set aside the resolutions, the debtor might come to me on my next Chamber day and be adjudicated insolvent. Then his creditors might, under sec. 167, sub. 2, pass a resolution that the debtor's insolvency had arisen from circumstances for which he could not justly be held responsible, and on such a resolution being passed the judge would be obliged to give him his certificate of discharge *Re Harrison*, *per* Lilley, C.J, 7th August, 1876; *re Bennett*, 2 Q.L.J., 128. Therefore, an order vacating the resolutions would be abortive. By subsection 10 of section 202 a debtor's discharge operates as a close of his insolvency, and has the same effect as in insolvency. I do not think that the resolution granting him his discharge can be said to be in the interests of the debtor. I find the resolutions were passed *bonâ fide*, but if the resolution about the sale of the furniture had been registered, I might have made an order vacating the resolutions, as that was probably in the interests of the debtor. I dismiss the motion, but make no order as to costs, because the resolutions as carried at the meeting, if registered, might have been set aside.

Solicitor for applicant: *J. G. McGregor*.

Solicitors for debtor: *Powers & Robinson*.

ECCLESIASTICAL JURISDICTION.

HARDING, J. 2nd September, 1893.

Re the lands of WATSON, DECEASED.

Administration—Mortgage—Conflict of interest—Trustee Act Amendment Act of 1892 (56 Vic., No. 18), s. 2—Queensland Trustees Limited Acts.

The Court has no power to sanction a loan from a company acting as administrator in one estate to the same company acting as administrator in another estate.

PETITION by the Queensland Trustees Limited, as administrator in the estate of E. C. Watson, for leave to borrow money from the company, as administrator in another estate, for the preservation of the estate, damage having arisen to property owing to floods.

Chambers, in support of the petition.

HARDING, J.: Have you any precedent of a company or an individual acting in the double capacity of mortgagor and mortgagee?

Chambers: In the matter of *George Harris, deceased*, an order was made in June, 1892, by Lilley, C.J., on the application of the same company. There the testator left real property heavily mortgaged. The judge allowed the company to advance from one estate the sum of £200 in the interest of the estate, notwithstanding the possible conflict of interest and duty. The order also provided for the company advancing money itself to keep down interest, and, if necessary, to pay off the encumbrances, the rate of interest being fixed at 8 per cent. [HARDING, J.: Were any authorities cited then?] The constitution and nature of the company, the purpose for which it was formed, and the obligations put upon it by its own Acts are sufficient. Sections 8 and 9 deal with the security to be given. [HARDING, J.: That is a general security instead of giving security in each estate; but that is not a security against illegality. They have not to give the ordinary administrator's bond.] All the assets are liable in the event of a breach of trust, and the directors and manager are individually and collectively liable by the ordinary process—sec. 15. [HARDING, J.: If the breaches of trust are wholesale the £25,000 and the security of the directors will not go far.] That applies only to administrators and executors. The company does other business. The maximum rate provided by sec. 16 for administering an estate is five per cent., but the company has not charged more than two and a half per cent. Section 18 allows a person interested to get an account of the property and assets in any estate. [HARDING, J.: Is there anything in the Act which permits the company to do legally what cannot be done legally by an individual?] There is nothing expressed. The Act is recent and the preamble very long. [HARDING, J.: I do not think much of preambles. Over three hundred of them have just been repealed by the English Legislature. This is a private Act. If your contention is right there must be several authorities that a trustee of two estates can lend between the two. There is an old maxim that no man should be put into such a position that his duties shall conflict with his interest.] That is not so in this case. The administrator has duties to both estates. [HARDING, J.: The position is this. First of all there is the necessity of making a profit to the company. Then his duty is to do the best he can for his trust. Two things in direct conflict. When he advances money it is his duty to do the best he can for the person lending; and with respect to the borrower, he has also the duty to do the best he can for him. Direct conflict again. How often has it happened that a beneficial compromise has been arranged by the solicitors on each side meeting and talking the matter over? If there is one side only he would do nothing.] Very often a compromise is arranged by a person acting for both parties. At home, one solicitor can act for two parties, and there is a scale of fees to be charged to the mortgagee and the mortgagor, the vendor and purchaser.

HARDING, J.: I must follow what I believe to be the law. If the law, as I hold it, is hard, the Legislature has power to alter it, but I do not see

how to get over the difficulty. If the money is to be obtained from some other person I shall not object to granting the application. It seems to me I am asked to sanction the commission of a breach of trust. I refuse to make the order as prayed in that direction.

Solicitors: *Chambers, Bruce & McNab.*

GRIFFITH, C.J. 6th and 22nd September, 1893.

Re the lands of CATHARINE BURKE, DECEASED.

Intestacy—Maintenance of children—Payments by Curator—41 Vic., No. 28, ss. 50, 51.

B. died intestate leaving a widow and five children. The widow became administratrix, and died shortly afterwards, devising her husband's property to her children. The executor did not prove the will, and the Curator of Intestate Estates was appointed administrator. The Court authorised the Curator to expend money in the maintenance of the children. On particulars being filed of certain payments not authorised by the Court, an order was made ratifying the payments, and the Curator was authorised to pay the amount due to each child on attaining the age of twenty-one years.

PETITION, under sections 50 and 51 of *The Intestacy Act of 1877*, for ratifying and confirming certain payments which had been made for the maintenance of two children, and for authorising the Curator to pay to each child of Catharine Burke, on attaining the age of twenty-one years, the amount due to each, out of the estate, less the cost of administration. Peter Charles Burke died intestate in October, 1879, leaving a widow and five children. Letters of administration were granted to Catharine Burke, who died in May, 1881, having made a will in which she devised the property of her husband to her children, and appointing John Larkin executor. Larkin died in 1884 without having proved the will, and the Curator of Intestate Estates was appointed administrator in 1886. There were two sons and three daughters, the oldest being twenty-two and the youngest fifteen. In September, 1887, an order was made by the Court authorising the Curator to expend money in the maintenance of the children; but some of the payments which had been made were not authorised by the order, and their ratification was now sought.

Chambers, in support of the petition.

GRIFFITH, C.J., required full particulars with regard to the purposes for which the payments not authorised had been made, and the circumstances under which they were made, to be supplied and verified, and, being satisfied that they would have been authorised by the Court if application had been made before the expenditure was incurred, made an order as prayed.

Solicitors: *Chambers, Bruce & McNab.*

GRIFFITH, C.J. 9th October, 1893.

In re the Will of GEORGE WATSON, DECEASED.

Practice—Administration with will annexed—Union Trustee Company of Australia Limited Act Amendment Act of 1892 (56 Vic.), s. 3—Judicial discretion—Notice.

An application for a grant of letters of administration to the Union Trustee Company of Australia Limited, under s. 3 of *The Amendment Act of 1892*, must be made to a Judge and not to the Registrar, as a judicial discretion must be exercised. The ordinary notices in applications for probate will usually be sufficient.

APPLICATION by the Union Trustee Company of Australia Limited, and the executors named in the will of George Watson, late of Kangaroo Point, plumber, for grant of letters of administration with the will annexed, to the Union Trustee Company. As this was the first application under *The Amendment Act of 1892*, the Registrar referred the matter to the Court. The executors did not desire to act.

Feez, for the applicant, asked whether such applications should be made to a Judge or the Registrar, and what time must elapse after notice. Notice of the motion had been given by advertisement in the ordinary way, and in addition each of the beneficiaries under the will had been served with notice.

GRIFFITH, C.J.: I am prepared to grant this application. With regard to the points raised, section 3 of *The Union Trustee Company of Australia Limited Act Amendment Act* passed last

year, provides that any person named as executor may join with the company in applying to the Court for administration with the will annexed to be granted to the company, and the Court may, in any such case, if it thinks fit, grant the administration. I think the use of the words "if it thinks fit" in that section indicates that it is not a matter of course, that the Court must exercise a judicial discretion as to whether the application should be granted or not. That being so, the application must be made to a judge, and the duty cannot be delegated to the Registrar. The rules under *The Probate Act*, which confer authority upon the Registrar, do not contemplate a case in which the Legislature expressly imposes discretion on the Court. With respect to the notice, I do not think there is any necessity for more notice than is ordinarily given; but, if in any particular instance it appears to the Court that the notice is insufficient, it will no doubt direct the application to stand over for sufficient notice to be given to any person who may wish to appear. I see no reason why the application should not be granted, and I grant it accordingly.

Solicitors: *Hart, Flower & Drury.*

SEPTEMBER SITTINGS OF THE FULL COURT

WILLIAMS *v.* UNION BANK OF AUSTRALIA.

Malicious prosecution—Improper motive—Criminal law—Mixed motive—Malice—Reasonable and probable cause—Re-assessment of damages—Appeal to Privy Council.

B., a manager for the defendants, caused a warrant to be issued for the arrest of W. for impairing defendants' right of property in two mares, alleged to be included in a stock mortgage of which the defendants were the assignees. The defendants ratified the action of their manager. W. claimed that the horses were not included in the mortgage. B. was aware of W.'s claim. The jury found that B. honestly believed that W. had committed the offence charged, and that he was not actuated by any indirect motive other than a desire to bring to justice a man whom he honestly believed to be guilty, except a desire to protect and get possession of the bank's property. They assessed the damages contingently at one farthing. It was in evidence that W. had paid between £35 and £40 for his defence in the Police Court.

Griffith, C.J., held that there was no reasonable or probable cause for the prosecution; but that the wish of B. to recover possession of his employers' property was laudable, and did not establish malice; and that, on the findings of the jury, the defendants were entitled to judgment.

Held, on appeal, by Harding, Chubb, and Real, JJ. (reversing the judgment of Griffith, C.J.), that, if a man who puts the criminal law in motion has any other motive than a desire to bring a person to justice, however commendable in itself, the motive is tainted and malice displayed in the prosecution.

Held, also, that there was no reasonable and probable cause for the prosecution, that there was malice, and that the damages were unreasonable, and there must be a re-assessment of damages.

An order for a new trial was refused, but the plaintiff was allowed his costs of the appeal.

Leave was given to the plaintiff to proceed with the re-assessment on giving security to the satisfaction of the Registrar to abide by the order made on appeal to the Privy Council.

Bank of New South Wales v. *Owston*, 4 Ap. Ca., 270; *Stevens* v. *Midland Railway Co.*, 10 Ex., 352; *Brown* v. *Hawkes* (1891), 2 Q.B., 718; and *Phillips* v. *S. and W. Railway Co.*, 5 Q.B.D., 78, followed.

ACTION for malicious prosecution and false imprisonment, tried before Griffith, C.J., and a jury, at Toowoomba, on 11th July and subsequent days.

In 1886 the plaintiff was the owner of certain thoroughbred stock. On 23rd July in that year he mortgaged his horses to his brother, George Williams, for £3,000. Some years afterwards he had transactions with the Union Bank of Australia, and mortgaged property at Tent Hill, Gatton, to them. His brother also had transactions with the bank, and he agreed with them to exchange his stock mortgage for a mortgage which the bank held over another property. By this means the bank were able to consolidate their mortgages. They accepted an assignment of the stock mortgage without taking any further assurance from the plaintiff. On 16th November, 1891, the bank took possession of the property, and placed a man named Molen, who had been stud groom to the plaintiff, in charge. The plaintiff was away at the time, and did not hear of the action of the bank till three months afterwards. The plaintiff claimed that some of the stock taken possession of, including two mares, were not in-

cluded in the mortgage. He asserted his claim to these two mares by taking forcible possession of them on three separate occasions. Mr. Bennett, the defendants' manager at Toowoomba, laid a complaint against the plaintiff for impairing the right of property of the defendants in the two mares, alleged to be included in the said stock mortgage. Bennett had previously caused the plaintiff to be arrested on a charge of stealing another of the horses in dispute, when the plaintiff set up a claim that the horses were not included in the stock mortgage, and the Crown prosecutor declined to find a true bill against him. The plaintiff thereupon issued two writs against the defendant bank, each for £10,000 damages, for malicious prosecution. Bennett was aware of the plaintiff's claim to the mares, and the reason for making it, and had made inquiries into the claim. The bank ratified the action of their manager.

The findings of the jury appear in the judgment of The Chief Justice.

Lilley, for plaintiff; *Feez*, and *Gore-Jones*, for defendants.

GRIFFITH, C.J., delivered judgment as follows: This was an action for malicious prosecution. The charge against the plaintiff, which was laid under section 35 of *The Mercantile Act of 1867*, was for impairing the right of property of the defendants in two mares, alleged to be included in a registered stock mortgage of which they were the assignees. The complaint was made on oath by the defendants' manager, Mr. Bennett, and a warrant for the apprehension of the plaintiff was issued in the first instance, in which was included a direction to the police to take possession of the mares in question, and any other horses that might be pointed out to them by the informant. No question is raised on the point whether an action for malicious prosecution will lie against a corporation. The defendants, indeed, explicitly ratified the action of their manager. For the purpose of determining whether there was reasonable and probable cause for the prosecution, I left to the jury specific questions, in answer to which they found—(1) That it was doubtful whether the mares in question were included in the registered mortgage; (2) that when Bennett laid the complaint he believed that they were so included; (3) that this belief was not induced by plaintiff's conduct; (4) that if so induced it was not a reasonable inference from his conduct; and (5) that Bennett did not know that plaintiff had set up a *bona fide* claim to the mares as his own. I have felt some difficulty with respect to this last answer. I must, however, I think, take it in conjunction with the admitted facts of the case. It appeared in evidence, and was not controverted, that, for a period of six weeks at least before the prosecution was begun, plaintiff had been claiming certain horses, of which the two mares, the subject of the complaint, formed part, as his own, and had asserted that claim by taking forcible possession of some of them on three separate occasions before that in respect of which the complaint was laid. Bennett himself said that he was aware of the claim made by the plaintiff, that he took trouble to inquire into the grounds of it, that the result of his inquiries was that he understood that the plaintiff claimed that the horses were not included in the mortgage, otherwise he (Bennett) supposed the plaintiff would not have taken them. He had, a fortnight before laying this complaint, caused plaintiff to be given into custody for stealing another of the horses in dispute, and this charge had been dismissed, the plaintiff having set up the claim that the horse was not included in the mortgage. As all these facts appeared from the evidence of Bennett himself, the answer of the jury that he did not know that plaintiff set up a *bona fide* claim must, I think, be interpreted to mean that he did not know or did not think that the claim, which was admittedly set up in fact, was made in good faith. In any other sense it would be so contrary to the admitted facts that I think I should be bound to disregard it in considering whether there was or was not reasonable and probable cause for the prosecution. I interpret the finding of the jury, then, in this limited sense. And as it is clear that the plaintiff's claim was, in fact, known to Bennett, as well as the ground for

making it—namely, that the mares were not included in the mortgage—and as it was not suggested that Bennett took any steps (as he might easily have done) to remove the doubt which the jury say still exists on the point, I am of opinion that there was no reasonable or probable cause for the prosecution. It remains to consider the question of malice. On this point I left three questions to the jury. (1) Did Bennett, when he made the complaint, honestly believe that the plaintiff had committed the offence charged? (2) Was he actuated by any indirect motive other than a desire to bring to justice a person whom he honestly believed to be guilty? (3) Was his action malicious? I directed them in accordance with the case of *Brown* v. *Hawkes*, 1891, 2 Q.B., 718–723, that if a man puts the criminal law in motion against another, honestly believing him to be guilty of the offence charged, and actuated only by a desire to bring to justice a person whom he honestly believes to be guilty, he is protected from any liability for his injurious act; but that, if he is actuated by other indirect and improper motives, that protection is not extended to him if it turns out that there was no reasonable ground for the prosecution. I left the third question to the jury in deference to the authority of *Payne* v. *Revans*, 9 W.R., 693, as cited in *Roscoe on Evidence*, p. 811, but I told them that the existence of such a motive as suggested in the second question would amount to what is called malice, observing that the two questions might be considered as substantially the same, and that, if they answered the second in the affirmative, they should give the same answer to the third. The jury answered the first question in the affirmative, the third in the negative, and in answer to the second said, "No, except a desire to protect the bank's property," by which, in answer to a further question put by me, they said they meant that Bennett "wished to get possession of the bank's property, but had no other wrong motive." By my direction they added the same qualification to their answer to the third question. I then directed them to assess damages contingently, which they did, assessing them at one farthing. The case of *Payne* v. *Revans* does not, on examination, support the proposition that it is necessary to leave the question of malice to the jury *eo nomine*. I think it is likely to give more assistance to a jury in arriving at a just conclusion to ask them the question in the form in which I first left it to them, than to tell them that malice bears a different meaning in law from its ordinary meaning, and then, after explaining that artificial meaning, to leave the question of malice to them *eo nomine*. And I think it sufficient to do so. Upon these findings, the question arises whether the existence of a desire to recover the defendants' property, which Bennett honestly believed was being wrongfully taken by the plaintiff, as well as to punish the plaintiff for his supposed wrong-doing, is such an indirect and improper motive as to deprive the defendants of the protection which is afforded to an honest but mistaken act, and so to establish what is called malice. In actions for malicious prosecution and other analogous actions, such as for maliciously procuring a man to break a contract, *Lumley* v. *Gye*, 20 E. and B., 216; *Bowen* v. *Hall*, 6 Q.B.D., 333; for slander of title, for defamation, malice is sometimes spoken of as being of the gist of the action; or, it is said, an indirect or improper motive must be added to the other necessary conditions to complete the cause of action. It is acknowledged that this is an anomaly in the law, which ordinarily does not take notice of motives, but only of acts and intentions. Hence has arisen a difficulty with regard to maintaining such actions against corporations, to which, it is said with much force, it is impossible to ascribe malice or motive. (See per Lord Bramwell in *Abrath* v. *North Eastern Railway Company*, 11 A.C., at p. 251.) The same difficulty has been raised with regard to maintaining an action for deceit against a corporation. It appears, nevertheless, that both classes of actions have been successfully maintained against corporate bodies. It seems to me that these difficulties have arisen from considering the improper motive in the one case, and the fraudulent motive in the other, as part of the cause of action,

instead of as a circumstance, the existence of which leaves the person who commits an act injurious to another exposed to the ordinary consequences of an injurious act which is not justified or excused by law. The criminal prosecution of an innocent man is an injurious act, especially if it is undertaken without reasonable or probable cause. So is the breaking of a contract at the instigation of a stranger. So is a false statement made in the course of a bargain, and acted upon to the prejudice of the person to whom it is made. But in all these cases, such is the infirmity of human nature, and the infinite variety of human transactions, that it is quite likely that the injurious act may have been committed innocently, and, so to say, accidentally. If this is the case, the law, in mercy to the weakness of humanity, holds the injury excused. But, if the injurious act is not done innocently or accidentally, the law leaves the person who has done it unprotected. It may be said that this view is inconsistent with the rule that the burden of proof of malice or fraud is on the plaintiff. But the answer is that the law, in the absence of such proof, gives the defendant the benefit of the doubt which may exist in any such case. I think that this view of the law reconciles the different opinions expressed in the cases, and at the same time shows how such an action may properly be maintained against a corporation—not by imputing to it a state of mind or motive, but by holding it responsible for the act of its authorised agent, if that act is injurious to another, and is not protected by any rule of law. What, then, is the kind of motive which will leave unprotected a person who does an injurious act of this sort? I think that the principle established by the case of *Derry* v. *Peek*, 14 A.C., 337—namely, that proof of an evil mind or *mens rea* is essential to the maintenance of an action for deceit—is equally applicable to the whole class of cases to which I have referred, and in which a state of mind or motive comes in question. I know no better definition (if I may say so with respect) of the term "malice," as applied in actions for malicious prosecution, than that given by Bowen, L.J., in *Abrath* v. *North Eastern Railway Company*, 11 Q.B.D, at p. 455—"An indirect and improper motive not in furtherance of justice." The term "improper" must, I think, for the reasons just given, be taken to imply something more than an extraneous or irrelevant motive. It must be evil—a desire to do something that ought not to be done by an honest well-meaning man. Applying this test to the present case, is it an evil or improper thing for a man, who believes that his own or his master's property is being taken under circumstances which amount to a criminal offence, to desire to prevent a recurrence of the offence, as well as to punish the offender? The indirect motive suggested at the trial was a desire to avoid the delay and expense of civil litigation, and, by summarily locking up the plaintiff and taking possession of the property in dispute, to put an end to the controversy. I told the jury that, in my opinion, such a motive would be an improper one, and would deprive the defendants of the protection which an honest belief in the plaintiff's *guilt* would otherwise have afforded. But the *finding* of the jury does not go so far as the suggestion of the plaintiff's counsel. No explanation was given of the issue of a warrant in the first instance, or of the inclusion in it of the authority to the police to take possession of the disputed property. These circumstances were, as I told the jury, evidence, and perhaps strong evidence, of an improper motive, but I do not think they are more than evidence; and the jury have declined to draw the inference of the existence of any indirect motive, except the mere desire to recover the property. If the complaint had been, as the first was, of larceny, would a contemporaneous application for a search warrant have been improper? I do not think so, although the application would have been obviously actuated by a desire to obtain possession of the property supposed to be stolen. The offence charged in the present case was analogous in its character to larceny, and the circumstances naturally gave rise to the same desire. I cannot think that this wish on the part of Bennett to recover possession of his employers' property

was other than laudable, and I am unable to understand how a laudable desire can establish malice in any intelligible sense. It is, I think, unfortunate that this word should so often be used in our law in a non-natural sense. But in the present case I do not feel bound to give any forced construction to it. I think, therefore, that on the findings of the jury the defendants are entitled to judgment. If the findings themselves are impeached, the remedy must be sought in another Court.

From this judgment the plaintiff appealed, and the appeal was heard at the September Full Court before Harding, Chubb, and Real, JJ.

Lilley, for the appellant.

Byrnes, *A.G.*, and *Feez*, for the respondents.

The plaintiff sought to have the judgment set aside, and judgment entered for the plaintiff on the grounds that, on the findings of the jury, the entry of judgment for the defendants was not in accordance with the law. He also moved that the findings of the jury assessing the damages *should* be set aside, and a re-assessment of the damages be had between the parties on the following grounds:—(I) That the finding was contrary to the evidence; (2) that the finding was contrary to the direction of the judge at the trial; (3) that the finding was perverse. In the alternative the plaintiff asked that the judgment might be set aside and a new trial had between the parties on the grounds that the findings of the jury were against the evidence; contrary to the direction of the judge at the trial; and perverse.

Lilley: The finding as to motive cannot be upheld. If the defendants' manager had any other motive than a desire to bring a person, whom he believed to be a wrongdoer, to justice, he was, in law, actuated by a wrong motive. His real motive was to get possession of his employers' property. He was not actuated solely by a desire to punish an offender. If any other motive existed, it is essential that the prosecution should be successful. If it failed, the prosecutor had to take the consequences. [REAL, J.: The motive may be of itself a very laudable one, but not sufficient to justify a criminal prosecution.] The desire to recover the bank's property was an indirect and improper motive. *Owston* v. *Bank of New South Wales*, *Knox*, p. 36; and on appeal, 4 Ap. Ca., 270, is a similar case. [HARDING, J., referred to *Swanwick's case*, 1 Q.L.J., 117, as binding on the Court so far as it went.] It is impossible to divide the motive. It is difficult to discover how much the one impulse has influenced the prosecution, and how much the other. It is a perfectly lawful thing for a servant to desire to look after his master's possessions, but an action for detinue is the right thing for that. The defendants' manager preferred to put the criminal law in motion. As he failed to carry the prosecution through, the defendants must bear the consequences. *Brooks* v. *Warwick*, 2 Stark, 389; *McDonald* v. *Brooke*, 2 Bing, N.C., 217; *Tebbutt* v. *Holt*, 1 C. & K., 280, 289; *Mitchell* v. *Jenkins*, 5 B. & Ad., 594; *Stevens* v. *Midland Railway Company*, 10 Exch., 352; *Hicks* v. *Faulkner*, 8 Q.B.D., 167; *Abrath* v. *N. E. Railway Company*, 11 Q.B.D., 440; *Brown* v. *Hawkes* (1891), 2 Q.B., 718; *Le Lievre* v. *Gould* (1893), 1 Q.B., 491. The plaintiff, on the findings, was entitled to judgment. The plaintiff is entitled to a re-assessment of damages. The expenses of getting bail amounted to £35, and the plaintiff was defended by counsel. *Armitage* v. *Haley*, 12 L.J., Q.B., 323; *Phillips* v. *London and S. W. Railway Company*, 5 Q.B.D., 78; *Falvey* v. *Stanford*, L.R. 10, Q.B., 54. [HARDING, J.: On the questions put to the jury there is no reasonable and proper cause found. There is a sort of introductory statement in leaving the questions to the jury. The judge told them that they might assume all other facts to be in favour of the plaintiff, and then the question is—Did he make reasonable inquiries into the truth of the subject matter of belief before he instituted proceedings?] It is admitted that he did not. [*The Attorney-General:* No, certainly not. REAL, J.: If that is not the construction, then there has been a mis-trial, as these questions standing alone, there would not be sufficient to decide the issues between the

parties which they wanted to be tried. They would not show sufficient facts to let the judge ascertain reasonable and probable cause. The judge said, in summing up, "I told the jury that they may assume all the other facts to be proved in favour of the plaintiff." That means, if it means anything, that every fact not put in issue by the questions he was putting to the jury was to be taken as if answered in favour of the plaintiff. No objection was taken to the direction, and how can it be impeached now? CHUBB, J.: The facts as to reasonable and probable cause were not left to the jury at all.] The judge told the jury there was no reasonable and probable cause. There was no evidence to support the jury's findings. The charge was for impairing the bank's right of the property in the mortgage, but there was no evidence that Bennett had an honest belief that the plaintiff was guilty of that charge. How could he have an honest belief that the right of property was impaired? [HARDING, J.: You have not satisfied me about the point. Suppose he honestly believed that the law was different to what it actually was. The question is, did the man honestly believe that the offence was committed?] He says that he did; but how could he believe it? What ground had he for coming to such a conclusion? [HARDING, J.: He believed that the mare was subject to the mortgage, and the plaintiff was going away with it, consequently he believed that he impaired the property.] Bennett could not have honestly believed that the bank's right of property was being impaired. *Stephen's Malicious Prosecution*, 54. [HARDING, J.: It all resolves into the question as to whether he made reasonable inquiry.] The jury found that he made no inquiry. The only thing he did was to tell his solicitor that the horses were mortgaged, and he asked how he was to prevent the plaintiff from taking them. He did not tell his solicitor that the plaintiff claimed the horses as his. As a matter of fact he says he did not, and therefore he did not lay all the facts before his solicitor. He could not honestly believe that the plaintiff was guilty of the charge. [REAL, J.: The absence of reasonable ground may be evidence from which the jury can come to the conclusion that the belief was not honest; but if they come to the conclusion that the belief was honest, notwithstanding the absence of reasonable ground, do you contend that the word "honest" must be substituted for "belief on reasonable grounds?"] Yes, your honour. [REAL, J.: Then what is the good of using the word "honest" at all?] If he had the means of finding out whether the plaintiff was guilty or not, and abstained from making inquiries, he could not have an honest belief. [REAL, J.: That may make him liable to an action for malicious prosecution; but that is not what we are dealing with now. We are dealing with the answer to a particular question as to whether he had an honest belief. Have you any authority to show that the word "honest" must be read with "belief on reasonable grounds?" An "honest belief," unless founded on reasonable grounds, may not protect him, but that is another matter.] The man did not take the steps which a fair and cautious man would take. If he abstain from taking those steps he cannot be said to have an honest belief. He acts recklessly. It is submitted that on the law The Chief Justice was wrong; that His Honour should have entered judgment for the plaintiff; that he probably would have done had he seen the case of *Owston* v. *Bank of New South Wales*. Judgment should be entered for the plaintiff, and a re-assessment of damages, or, in the alternative, a new trial.

Byrnes, A.G.: On the findings as they stand the defendants are entitled to judgment. *Daniell's* Ch. P., 6th edit., 1290, O. LVII, r. 7. If the defendants succeeded on the question of malice they would succeed altogether. The judge was wrong in saying there was no reasonable and probable cause. On the question of malice the judge put three questions to the jury—8, 9, and 10. [REAL, J.: My difficulty is this: Either it must be the law that no question of reasonable and probable cause is solely for the judge, in which case the answers are against you; if that is not the law, then the law is that the judge must ascertain reasonable and

probable cause from the facts found by the jury. If all the necessary facts are not contained in the particular questions put, there was not sufficient for him to find it, unless they are to be taken as admitted.] That would not affect the question of malice. On the question of reasonable and probable cause it is not necessary to make inquiry. *Brown* v. *Hawkes*. The jury's findings show they intended to negative malice. If a man's motive was to bring a person to justice whom he honestly believed guilty, the existence of any other motive will not render his action malicious. [HARDING, J.: *Brown* v. *Hawkes*, and *Stevens* v. *Midland Railway Company* are against you. Do you see what Smith, L.J., says?] He was practically overruled. The Court of Appeal were unanimously against him. [HARDING, J.: Then Kay, L J., is against you.] Bennett honestly believed the charge. [REAL, J.: He swears himself he went down to see his solicitor and told him all the facts except the one that the plaintiff had made a claim, and that the solicitor said "Lay an information against him, that is the only way to stop him taking the property." The question is capable of two constructions. There is a defect in the question. CHUBB, J.: The form of the question assumes he had a desire to prosecute. REAL, J.: If it is conceded that he had a desire to bring the offender to justice, and there was no evidence of a superadded motive, what was the trial about?] The defendants' contention is that, having established the desire to further the ends of justice, there was a defence to an action for malicious prosecution. It is only necessary to carry the present case to a laudable motive, besides the desire to bring an offender to justice. If a man prosecuted another simply out of anger, that would be a malicious prosecution; but if he prosecuted him out of anger coupled with a desire to bring him to justice, the prosecution would be justifiable. *Swanwick's case* does not bear on the present case at all. That was a case in which a man attempted to extort money by a threat of criminal proceedings, and he was dealt with by the Court, of which he was an officer, on that ground alone. It was held that a man who was guilty of such conduct as that was unworthy of remaining on the rolls; but in the present case there was a desire to further the ends of justice. [HARDING, J.: It goes to show that it is wrong to use the criminal law for any other purpose than to bring a person to justice.] It only goes to show that the Court will not allow its officers to be guilty of conduct of that sort. In *Owston* v. *Bank of New South Wales*, the question is not what constitutes malice, but it is one of authority. [HARDING, J.: Does not the mere institution of criminal proceedings show an intention to bring a man to justice? It must exist to some extent in every case.] In that case the jury found a special verdict in favour of the plaintiff, and they must have found that there was malice sufficient to support an action for malicious prosecution; but there was no pretence that the proceedings were instituted otherwise than to secure the property. [REAL, J.: The only difference is that in one case criminal proceedings were instituted for the sake of bringing a criminal to justice, and in the other proceedings were instituted for the sake of getting some other advantage by bringing him to justice. It was a means to an end.] A man may prosecute for the sole purpose of bringing the offender to justice, and he may prosecute simply for furthering his own private ends, but there is an intermediate course in which a man may prosecute both for the one and the other—for the furtherance of public justice, and with the hope to protect his own property. [REAL, J.: How is the case to be measured? HARDING, J.: How is the compound to be simplified?] If that be the dilemma, what must be the dilemma on the other side if any other motive exists? [REAL, J.: No, not exists; but if any other motive actuates the institution of the prosecution.] Can there be a single case conceived—knowing mankind as we do—in which a criminal prosecution is instituted solely for the purpose of bringing a man to justice? [REAL, J.: Then, if he had a desire to bring the man to justice, it does not matter what other desire he may have, although we might be satisfied

that that would not be sufficient to make him move.] That desire is in law sufficient justification to put the law in motion. [REAL, J.: If we accept that contention, the proper form of question would be: Did the prosecutor desire to bring the man to justice?] The proper question to put was: Was the action malicious? [HARDING, J.: In this case the jury said he wanted to get possession of what he believed to be the defendants' property, but with no other wrong motive.] But the answer begins with a negative. The Court will not read into the answer a construction which nobody conceived of until the matter came into Court. [HARDING, J.: The construction is the most natural, on the words used.] In *Tebbutt* v. *Holt*, the point was to get a debt from a client, or to get more costs for himself. In *Mitchell* v. *Jenkins*, the judge withdrew the question of malice, and a new trial was granted on the ground that he did so, and malice there was defined as improper and indirect motive. In *Stevens* v. *Midland Railway Company*, the only question was whether there was evidence of malice. [HARDING, J.: The pure motive of bringing a man to justice excuses; then you mix it and it is no longer pure.] If a man be justified by the desire to further the ends of justice, the presence of another motive which is laudable in itself cannot impair the defence which a man has by reason of the existence of the first motive. In *Brown* v. *Hawkes*, the judge deals with the anger in the man at the same time that he instituted the proceedings, and he decides that the anger when it was coupled with the desire to bring the man to justice did not remove his defence against an action for malicious prosecution. If a man has a valid excuse, the fact that there were ten or twelve other excuses which were not valid cannot impair the validity of the first excuse. There was reasonable and probable cause for the defendants' belief of the guilt of the plaintiff. The defendant had been frequently told by the plaintiff that the horses on the station were included in the mortgage, and it was not necessary for him to make any further inquiries. No matter what inquiries he made, he would not have got any more information on that point. On the question of damages, if the plaintiff were entitled to judgment on the findings of the jury, he must take the judgment which the jury found for him—namely, one farthing. The Court, except in the most extreme cases, would not interfere with the assessment of the damages, and must say that the jury was not wrong in assessing the damages at one farthing. The Court could not interfere with the damages without increasing them, and what would the Court fix them at? [REAL, J.: That is for the jury to decide.] That would be giving the plaintiff a chance of a second trial. Suppose a second jury returned with one farthing damages? [REAL, J.: The place would be probably abolished as a circuit district. HARDING, J.: They would not do such a wise thing as that. REAL, J.: They did at Roma on one occasion, because a cattle-stealer was not convicted. HARDING, J.: That was in the early days.] The finding as to damages should not be interfered with, especially in an action for tort. *Mauricet* v. *Brecknock*, 2 Ding., 508; *Apps* v. *Day*, *14 C.B.*, 112; *Hayward* v. *Newton*, 2 Str., 939; *Donelly* v. *Baker*, Barnes' Notes, 154; *Lord G.* v. *Heath*, and *Russel* v. *Ball*, *ib.*, 445 and 455; *Manton* v. *Bales*, 1 C.B., 444; *Wilson* v. *Hicks*, 26 L.J., Ex., 242; *Armytage* v. *Haley*, 4 Q.B., 917; *Forsdike and wife* v. *Stone*, L.R. 3, C.P., 607; *Rendall* v. *Hayward*, 5 Bing., N.C., 424; *Kelly* v. *Sherlock*, L.R., 1 Q.B., 686, 697; *Gibbs* v. *Tunaley*, C.B., 640; *Praed* v. *Graham*, 24 Q.B.D., 53. [HARDING, J., referred to *Horsley* v. *Style*, *9 Times* L.R., 605.] There was evidence to support the finding of the jury that Bennett honestly believed he had reasonable and probable cause for instituting the prosecution. [REAL, J.: If that is to be taken to mean anything more than that he believed in fact, I am not prepared to accept it. He swears that he believed in fact. If it means that it is to be taken he believed after reasonable inquiry, that is a different thing.] If the jury believed as a matter of fact that the defendants' manager believed the fact, they were surely at liberty to infer from his conduct whether

it was or was not a reasonable belief. Was that fact for the jury or for the judge? [HARDING, J.: Then you see the judge said they might assume all other facts to be proved in favour of the plaintiff, and the missing link here is, did Bennett make reasonable inquiry? If he did not, an honest belief without reasonable inquiry won't do.] The Court would not take what the judge said to mean more than he said it meant. It would certainly be a most extraordinary thing if the defendant had not disproved anything; everything must be taken as proved in favour of the plaintiff. In this case it was a question whether Bennet was bound to make any inquiry. It was a question for the jury whether, with the knowledge he had, he could reasonably come to the conclusion that he came to. It was clear that he had warned the plaintiff that if he took the horses they would be regarded as stolen, and that, before he took action, he consulted his solicitor. There was ample evidence to support the findings of the jury, and on the whole case the Court would not interfere with the learned judge on the question of malice. If, on the question of malice, the verdict was against the defendants, the judgment should be entered for not more than one farthing. If the verdict of the jury be set aside on the ground of the smallness of damage, then, on the authority of *Armytage* v. *Haley*, and *Forsdike* v. *Stone*, it must be on condition that the plaintiff pay the costs of the first trial.

There being a dispute as to the meaning of The Chief Justice's note: "I summed up and left the following questions to the jury, telling them that *they might assume all other facts to be proved in favour of the plaintiff;*" Mr. Justice Harding sent the following question to His Honour:—"Did this include the question, 'Did Bennett take reasonable care to inform himself of the true state of things?'" The Chief Justice sent back the following reply —"No question on this point was raised by either party. I asked the parties if they desired any further questions to be put. The steps taken by Bennett to inform himself appeared by his own evidence, and I was of opinion that, upon his own evidence, this question, if it arose on the facts—which I doubt—should be answered adversely to the defendants; in other words, that nothing he had said he had done could establish reasonable or probable cause for the prosecution."

HARDING, J., on reading this, said that it was in that way that he and his brother judges had interpreted the matter all along.

Byrnes, A.G., submitted that that was not the right interpretation. It appeared from His Honour's reply that the question was never raised. The assumption of their Honours was that all the questions raised that did not appear among the questions put by The Chief Justice were taken to be admitted in favour of the plaintiff. It was not necessary for the defendants' manager to do more than he said he did to show reasonable and probable cause. Bennett might have had information in his possession which he considered superior to anything he could get by further inquiry.

Feez followed.

Lilley, in reply.

HARDING, J.: In order to maintain an action for malicious prosecution, the plaintiff has to prove that he was an innocent man, and that his innocence was proven before the tribunal before which the accusation was heard; that there was want of reasonable and probable cause for the original prosecution—or, in other words, circumstances which in the opinion of the judge are inconsistent with reasonable and probable cause; and that the unreasonable proceedings of which he complains were initiated in a malicious spirit—that is from an indirect or improper motive, and not in furtherance of justice. He has to prove these three things, and the questions that have to be left to the jury are, as to the reasonable and probable cause:—(1) Did the defendant take reasonable care to inform himself of the true state of the case? (2) Did he honestly believe the case which he laid before the magistrate? Then, as to malice, the question is: Was the defendant actuated by any indirect motive in pressing the charge? Now, I would have preferred in the third question to ask the jury: "Were

the proceedings initiated maliciously?" and then direct them that, if the defendant was actuated by any improper motive in preparing the charge, that was malice. But it resolves itself into the same thing, and that that is the law, and that these are the questions which would raise the facts for the decision of the judge as to whether there was reasonable and probable cause, there is ample authority in the case of *Lister* v. *Perryman*, L.R., 4 H.L., 521, and the judgment of Hawkins, J., in *Hicks* v. *Faulkner*, and *Abrath* v. *The North Eastern Railway Company* before the Court of Appeal. The result of these questions, if reasonable and probable cause is found, is that the judge gives a verdict for the defendant, and the third question is unnecessary, because, if he had reasonable and probable cause, malice does not enter into the question. But if there was no reasonable and probable cause—that is to say, if both the two questions I have given are not answered in the affirmative—then we have to go further and inquire whether there was malice, and if there was no reasonable and probable cause and malice, there is a verdict for the plaintiff. That being the mode in which I have always tried these cases—I have tried a number of them—I shall proceed to inquire what was done in the present case. The case was tried at Toowoomba before The Chief Justice, and the prosecution was found to be without reasonable and probable cause, and the judge, on the findings of the jury, found that it was not malicious, and, consequently, entered the judgment for the defendants. As I have said, The Chief Justice has not adopted the mode of trial which I usually adopt, but he asked eleven questions instead of the three I have mentioned, and one as to damages, which would have been the fourth. In any ordinary case it is necessary to decide whether there is to be found reasonable and probable cause or not on the answers. Now, on the answers actually returned, I could not find that there was reasonable and probable cause, because the defendant did not take reasonable care to inform himself of the true state of the case. I cannot find that anywhere answered in this case, but His Honour in giving the questions to the jury directed them that, except as to these questions, they might assume all other facts to be proved in favour of the plaintiff. Consequently, if such a question as I find necessary had been asked, it would have been answered in the negative—namely, that the defendant did not take reasonable care to inform himself as to the true state of the case—and then questions 1 and 2 would have both been answered in the affirmative. Consequently there would not have been reasonable and probable cause, and the question whether there was malice or not in the prosecution would have had to be relied on. Whether there was malice in the prosecution or not depended upon the answers to questions 8, 9, and 10 of the eleven questions put by His Honour. In answering the 8th, "Did Bennett honestly believe that plaintiff committed the offence charged?" the jury found "Yes;" on the 9th, "Was he actuated by indirect motive other than the desire to bring to justice a person whom he honestly believed to be guilty?" they found "No, except a *desire to* protect the bank's property;" and in the 10th, "Was his action malicious?" they answered "No." The Chief Justice asked for a further answer to question 9, and the jury said "Bennett wanted to get possession of what he believed to be the defendants' property, but had no other wrong motive." Now, I am satisfied that what the jury meant in answering question 9 was that, in bringing the plaintiff to justice, he desired to protect the bank's property, but, except that, he had no other improper motive. He had no other indirect motive than to bring him to justice. In fact, I think that the answer to that question means that Bennett brought the plaintiff to justice for the purpose of protecting the bank's property. Now, it has been contended that as long as a person has the desire to bring a man to justice it does not matter what other motive he has I entirely disagree with that. I think that as soon as you have any other motive, you have no longer the single motive of bringing to justice, and you have a tainted motive—that is to say, a motive other

than the simple desire to bring to justice; and if you have that, I am of opinion that you have overstepped the bounds, and have got malice in the prosecution. Sufficient authority for that, I think, will be found in *Owston* v. *Bank of New South Wales. Re Swanwick, ex parte Bain* applies, and, passing over a number of cases quoted by Mr. Lilley, I think the views I take are particularly borne out by the cases *Stevens* v. *Midland Railway Company; Hicks* v. *Faulkner; Abrath* v. *The North Eastern Railway Company*, where it is particularly said by Brett, M.R., at 11 Q.B.D, 448: "It is not enough for the plaintiff to shew, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to shew that the prosecution was instituted against him by the defendants without any reasonable or probable cause, and with a malicious intention in the mind of the defendants—that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact." And also in *Brown* v. *Hawkes* (1891), 2 Q.B., at p. 725, Smith, J., says: "or whether his sole intention was honestly to put the criminal law in force against him." The other cases seem to bear this out. That being so, my view of the case is that, on the findings of the jury, there was no reasonable and probable cause found, but there was malice, and on these findings there must be judgment for the plaintiff. In the event of these findings being held to support the view which I take, the next point is the damage. The Chief Justice took the precaution of procuring from the jury an estimate of the damage which the plaintiff had suffered, should that view of the case be taken either by him or by the Court above, and they estimated the damage at one farthing. The nature of the damage alleged in the statement of claim was general, and also specific or special, the general damage being such as the plaintiff suffered in his character and reputation, and the pain of body and mind. The special damage was the great expense he was put to in defending himself from the charge, and in procuring bail for his release. With respect to the general damages the jury are entitled to give such damages as they think fit, from nothing upwards, but, if they give what are called vindictive damages, their verdict will not stand. Therefore it is desirable that, in considering these damages, they should follow the reasonable guide which is usually given them, above which they should not go. Generally there are special facts brought before them, but as long as they are not vindictive their verdict stands. With regard to the special damages it was admitted that the plaintiff spent or incurred the liability for the sum of from £35 to £40. In respect to the general damage, if there had not also been special damage, very probably this Court would not have interfered with the farthing. It is the rule and general practice of courts not to interfere with the findings of the jury in respect to general damage. I don't mean to say that the power does not exist, but probably it is not generally exercised. But with regard to the special damage, the jury should give something. In *Phillips* v. *London and South-Western Railway Co.*, mentioned before, but not cited in the books, I find it to be in 5 C.P.D., p. 280, which was an appeal from the findings of the jury, and a new trial directed, Bramwell, L.J., one of the judges deciding the case, says at p. 287: "I have, as judge, tried more than a hundred actions of this kind, and the directions which I, in common with other judges, have been accustomed to give the jury has been to the following effect—'You must give the plaintiff a compensation for his pecuniary loss; you must give him compensation for his pain and bodily suffering; of course it is almost impossible for you to give the injured man what can be strictly called a compensation, but you must take a reasonable view of the case, and must consider under all the circumstances what is a fair amount to be awarded to him.'"

Now, you see, in respect to both of the damages, that the Court of Appeal at home holds that you must give some damage. Now here there is a farthing given. That may be reasonable in

respect to the general damage, but the question is, is it reasonable in respect to the special damage? That special damage was for defending the man, and it was for obtaining his release from durance vile by bail, in respect of which the payment of from £30 to £40 was proved without any evidence on the other side. Now, the jury might have thought from £30 to £40 was an unreasonably large sum to have expended, and, to use the language that has been employed, they might have taxed it down to what they considered a reasonable sum; but, in accordance with one's knowledge, they could not have taxed it down to one farthing. One farthing would not get a man anything in the way of defence or bail; he might as well have been without it. Then the question is, that being the verdict, was it unreasonable—was it, without saying it was so much as perverse, such a verdict that four men would reasonably have arrived at? I consider that it was not. Again, could they, having arrived at that verdict, have given the case consideration? Does not the fact that a farthing was given for the repayment of the expenses of a defence in the District Court and in obtaining bail show that they could not have given a reasonable attention to the subject? The sum is too small, and consequently I think that that part of their verdict must be set aside. Authorities were quoted by Mr. Attorney-General on the subject of a re-assessment on this ground. Now, I think that the rule of all the authorities is properly given in *Pollock on Torts*, at p. 156: "The grounds on which the verdict of a jury may be set aside are all reducible to this principle: the Court, namely, must be satisfied not only that its own finding would have been different (for there is a wide field within which opinions and estimates may fairly differ), but that the jury did not exercise a due discretion at all" (just what I have been saying). "Among these grounds are the awarding of manifestly excessive or manifestly inadequate damages, such as to imply that the jury disregarded, either by excess or by defect, the law laid down to them as to the elements of damage to be considered; or it may be that the verdict represents a compromise between jurymen who were really not agreed on the main facts in issue"

Now, the cases cited by the Attorney-General, commencing with *Mauricet* v. *Brecknock*, and coming down and passing the case of *Phillips* v. *London and South-Western Railway Co.*, although I think they support the view I have taken, were where there have been nominal damages and there has been nothing else in the case but general damage. Then we don't find the verdict set aside, but in the cases where beside the general damage there has been special damage and special items of damage, we find a new trial granted on the principle which I have laid down, and on the same principle on which new trials are granted in other cases. Now, that being so, I think that there must be a new assessment, or a new trial so far as the damages are concerned. With regard to the general circumstances of the case, the facts were brought before us at very considerable length by the counsel on both sides, and, after carefully weighing them, I think that there was evidence on both sides for the jury to consider, and that it is not open to us to say that any of the circumstances would justify us in granting a new trial. Consequently, I think that the motion, so far as it asks for a general new trial, must fail. The plaintiff having succeeded on his motion should have the costs of this motion. With respect to the costs of the first trial, so far as it has been abortive, I think that the costs of the first trial and of the further re-assessmont should be in the discretion of the Court entering final judgment. The formal order will be as I have said.

CHUBB, J.: I am of the same opinion. I would content myself with simply concurring with the judgment pronounced by my brother Harding, but as we are taking a different view of the law, and I think also of the findings of the jury, to that taken by the learned judge below, I think it is desirable to say a word or two upon that matter. The learned judge below found that there was no reasonable or probable cause. The other facts being determined in favour of the

plaintiff, the plaintiff had to show what was technically or in law called malice. That was shown, in my opinion, by the answers that the jury gave to the questions 9 and 10, coupled with the further answer which they subsequently gave. I read these answers to be this: That Bennett, the defendants' servant, instituted a prosecution for the purpose and with the desire of protecting the bank's property and getting possession of it. In other words, he took a short cut to get the property, and when he instituted criminal proceedings he was not solely and only influenced by a desire to bring a person, whom he believed to be guilty, to justice. Now it must follow in every case of this kind, where a prosecution is brought, that the party must intend the consequence of his acts, otherwise the motive of having an honest desire to bring a guilty person to justice could not exist. If it can be shown in every case that he had that desire, according to the contention that has been made, it would not matter what other desires he had. I don't think that that is so. Criminal proceedings are for the purpose of vindicating the law—bringing guilty persons to justice for the purpose of deterring other persons from committing the same offence—and also for the remedial purpose of reforming the prisoner. The primal object is bringing the guilty person to justice. If you allow any other motive to operate, you file away the purposes for which the criminal law is in existence. I think that an indirect motive is any motive, or, in the language of Cave, J., "any motive other than a sincere desire to bring a guilty person to justice" In this case the jury have found that Bennett's desire was to get possession of the bank's property, and the evidence throws some light on that finding. It is stated that Mr. Bennett was advised by his solicitor that the only way to stop the plaintiff from taking the horses was to institute proceedings against him. I think, therefore, that there was malice, as we understand it; that an indirect or improper motive exists in the case; and that it was not in furtherance of justice that the proceedings were taken. That being so, and for the reasons given by my brother Harding, the judgment for the defendants should be set aside. With regard to the question of the damages, I agree also that there should be a re-assessment. It is, as my learned brother says, the practice of the Courts not to interfere with the verdicts of juries on the question of damages, but they have power to do so if they see any proper reason, as when excessive damages are awarded (*Sharpe* v. *Brice*, 2 W. Bl., 942). That principle as to excessive damages must also and does apply to cases where the damages are inadequate. If the Court came to the conclusion that the jury have given inadequate damages in consequence of not having taken into consideration the elements or some of the elements of damages that ought to have been taken into account, the Court would send the damages for re-assessment. That is the real decision in the case of *Phillips* v. *The London and South-Western Railway Co.*, 5 Q.B.D., 78. In speaking of the rule for a new trial, James, L.J., at p. 85, says: "The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which, generally speaking, is considered to be within their exclusive province—that is to say, the amount of damages. We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view and think that if they had been the jury they would have given more or would have given less. Still, the verdicts of juries as to the amount of damages are subject, and must for the sake of justice be subject, to the supervision of a Court of first instance, and if necessary of a Court of Appeal in this way—that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small, then the Court is bound to send the matter for reconsideration to another jury." It is the opinion that this Court has come to—that the jury in considering the evidence on that branch of the case omitted to take into consideration elements of damage, and that their finding of one farthing was unreasonable. I agree, therefore, that the case must go for a re-assessment of damages.

REAL, J.: I am of the same opinion. The plaintiff asks to set aside the judgment on the ground that the findings of the jury amounted to a finding of malice within the meaning of the law applicable to actions for malicious prosecution. As has been very properly said by the judge of the Court below, the meaning of the word "malice," used in connection with actions for malicious prosecution and many other actions, is somewhat different from the word "malice" used colloquially, and has consequently led to a good deal of misunderstanding. "Malice," says Cave, J., in *Brown* v. *Hawkes* (1891, 2 Q.B., 718-723), "in its widest and vaguest sense has been said to mean any wrong or indirect motive; and malice can be proved either by showing what the motive was, and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor." Again he says: "In this country we rely on private initiative in most cases for the punishment of crime; and while on the one hand it is most important firmly to restrain any attempt to make the criminal law serve the purposes of personal spite or any other wrongful motive, on the other hand it is equally important, in the interest of the public, that where a prosecutor honestly believes in the guilt of the person he accuses, he should not be mulcted in damages for acting on that belief, except on clear proof, or at all events reasonable suspicion, of the existence of some other motive than a desire to bring to justice a person whom he honestly believes to be guilty." The learned judge in his summing up—as appears by the copy of his notes supplied to us—after leaving certain questions to the jury, told them that they might assume all other facts to be proved in favour of the plaintiff. This direction was accepted by all parties. Looking at these words we must, I think, take it that all material facts necessary for determining the action, and not involved in the questions and answers, were admitted in favour of the plaintiff. But, it has been argued by the defendants' counsel, the first question we have to consider is whether the judge was right in his finding that there was no reasonable and probable cause. It has been contended by the Attorney-General that the findings of the jury are such as to preclude the learned judge below from holding that there was no reasonable and probable cause. Lest, however, there should be any misunderstanding, it was thought proper that the learned judge who tried the case should be asked a question as regards finding No. 5. His answer fully agreed with the view we had taken upon the notes which have been presented to the Court. Looking at these circumstances, I, with my brother judges, am satisfied the learned judge was right in holding that the absence of reasonable and probable cause was proved. Therefore it only remains to consider the question whether or not the finding that he was actuated by the desire to protect the bank's property is sufficient to preclude him from the protection which the law sometimes gives to a person who lays an information against an innocent person and causes him to be prosecuted without any reasonable or probable cause. It has been contended here that, if the desire to bring to justice exists, it matters not what other motives there may be. If this were so, it is hard to conceive how it is that in the actions for malicious prosecution hitherto decided the question has not been raised. The proposition contended for may be the logical consequence of the decision of the learned judge in the Court below, but the actual decision limits the protection to cases where the desire to bring to justice exists with another motive not in itself wicked or morally bad. The desire to protect one's master's property was not wicked but commendable. Such a desire is, however, an improper motive for a criminal prosecution. There are different means provided by the law for the protection of property—they are by civil proceedings. It was not contended by the counsel for the defendants that, if the desire to protect property were the only motive, the plaintiff must succeed, but it was contended that, having that motive, the motive to bring to justice pro-

tected him. I fully agree with my brother judges that in a case of malicious prosecution there is no liability on the prosecutor if, in the first place, the person is guilty. He may be as malicious as he likes. In the second place, there is no liability on the prosecutor if he had reasonable and probable cause—no matter how malicious. If he, in fact, had reasonable and probable cause, the question of malice does not enter into the matter. But if a man prosecutes a person who is not only innocent, but without any reasonable or probable cause for supposing him to be guilty, the law only protects such a prosecutor from the consequences of his wrongful act when he has been acting, so to speak, in substitution of the public prosecutor, who would naturally have no motive urging him but the desire to do justice. If he has the desire to serve some private end in a more speedy or convenient way than by having recourse to the ordinary civil proceeding, he is not protected and he takes the consequence of his action. He is not allowed to try his right by laying a criminal information, wherein, though he fails, he pays no costs. That alone would be sufficient to show the unreasonableness of allowing such proceedings. I may further add that I see nothing in the findings which shows that he (the prosecutor) was at all actuated by the desire to bring to justice, except so far as it can be inferred from the mere fact that he instituted the prosecution. I also agree with my brother judges, for the same reasons, that there must be a re-assessment of damages, and that judgment should be entered for the plaintiff and for a re-assessment of damages. The costs of this application to be paid by the defendants, and other costs to be reserved.

An application for leave to appeal to the Privy Council was made to Griffith, C J., who referred the matter to the Full Court held in October. He doubted whether such matters could be dealt with by a single judge except during the long vacations, but intimated that in any case he should have referred the application to the Full Court.

Harding, J.: It has been my practice to deal with such applications sitting as a judge exercising the powers of the Full Court in vacation.

Real, J.: That has been my practice too.

Lilley: The judgment is an interlocutory one and not final. *Highton* v. *Treherne*, 48 L.J., Q.B., 167; *Rocke, Tompitt & Co.* v. *Wilson*, 13 V.L.R., 833. If leave to appeal is given it should be on the terms that it should not be prosecuted until after the re-assessment of damages. *Milson* v. *Carter*, 9 *Times* L.R., 613. The words "or the result of the appeal in case the appeal be dismissed for want of prosecution" should be added. *Macdonald* v. *Tully*, 8 *Courier* Rep., 22a; *Martin* v. *Municipality of Brisbane*, 16th December, 1892.

Byrnes, A.G.: The order is final, and the only conditions that can be imposed are those provided by the Order in Council.

Harding, J., referred to the order made in *re Gibbon's Will*, 3 Q.L.J., 123; the order in *Miles* v. *McIlwraith*, 1 Q.L J., 49, is wrongly reported.

Order: Leave to appeal on petitioners giving security in the sum of £500 to the satisfaction of the Registrar, for the due prosecution of the appeal, and the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council to the respondent; the petitioners to be at liberty to pay £500 into Court in lieu of security. Let respondent be at liberty to proceed with the re-assessment of damages, and upon giving security to the satisfaction of the Registrar, to issue execution for the costs of the motion for judgment, and after re-assessment to proceed with judgment on giving security to the satisfaction of the Registrar to abide by the order of Her Majesty, &c., on such appeal. If such security be not given before the appeal is approved, let the execution of the order be suspended.

Solicitors for plaintiff: *Macdonald-Paterson & Hawthorne.*

Solicitors for defendants: *Macpherson & Feez.*

WILLIAMS *v.* UNION BANK OF AUSTRALIA.

Practice—Application to set aside verdict of jury —Weight of evidence.

A verdict of a jury will not be disturbed as against the evidence when there is evidence on both sides, unless the jury have acted in such an unreasonable manner that the verdict is necessarily unjust.

Metropolitan Railway Company v. *Wright*, 11 Ap. Ca., 152; *Phillips* v. *Martin*, 15 Ap. Ca., 193, followed.

MOTION for a new trial in an action for malicious prosecution, tried before Griffith, C.J., and a jury, at Toowoomba. on the ground that the verdict was against the evidence and the weight of evidence. Judgment was for the defendants at the trial, and the plaintiff appealed.

Lilley, for appellant; *Byrnes*, *A G.*, and *Feez*, for respondents.

HARDING, J.: This is a motion for a new trial in an action brought by James Williams, against The Union Bank of Australia Limited, in respect of malicious prosecution and false imprisonment for plaintiff's dealings with a certain pony. The Police Court proceedings took place at Gatton, as distinguished from another case, in which they took place at Toowoomba. The findings were such as to support the defendant's case, and the plaintiff failed. But in order to support the plaintiff's case, and to reverse the verdict, it would be necessary for the 9th question, "was he actuated by any indirect motive other than the desire to bring to justice persons whom he honestly believed to be guilty," to be answered in the affirmative, whereas it is answered in the negative, and Mr. Lilley moved for a new trial on the ground that that finding was against evidence and the weight of evidence. The law as to new trials has been dealt with by the Privy Council on two recent occasions, but they have followed in both cases the case of *The Metropolitan Railway Co.* v. *Wright*, in 11 App. Ca., p. 152, which was before the House of Lords; and there Lord Selbourne goes into the question: "In many cases the principle on which new trials should be granted, on the ground of difference of opinion which may exist as to the effect of the evidence, have been considered both in the House of Lords and the Courts, and I have always understood that it is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges, in the Court where the new trial is moved for, might have come to a different conclusion, but there must be such a preponderance of evidence, assuming that there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the judge, should return such a verdict." Lord Fitzgerald says that a verdict should not be disturbed unless it appeared not only unsatisfactory, but unreasonable and unjust. Now that is the House of Lords' case, and that has been followed in two Privy Council cases which bind us out here, and I believe our rule has always been within that. In *The Commissioner for Railways* v. *Brown*, 13 App. Ca., p. 133, which was an appeal from New South Wales, Lord Fitzgerald says: "Chief Justice Tindal, about fifty years since, laid down a rule to this effect: that where the question is one of fact, and there is evidence on both sides properly admitted to the jury, the verdict of the jury once found ought to stand, and that the setting aside of such a verdict should be of rare and exceptional occurrence." And further on he says: "The learned judge who tried the case does not disagree with the verdict, and their lordships are of opinion that the verdict, not unreasonable or unfair, and which was warranted by the evidence, once found, ought to have been permitted to stand." The last case before the Privy Council was *Phillips* v. *Martin*, 15 App. Ca., 193, also an appeal from the Supreme Court of New South Wales, in which Lord Macnaghton says: "It is settled that a verdict ought not to be disturbed unless, to use the words of Lord Herschell, in *The Metropolitan Railway Co.* v. *Wright*, it was one which the jury, viewing the whole of the evidence reasonably, could not properly find." So that really the question in every case of the kind is: is there evidence on both sides, and, if there is, have the jury acted in such an unreasonable manner that the verdict is necessarily unjust? Well,

that can only happen in the very rarest cases, and cases are very rare in which grounds of this kind can succeed. Now it has been clearly pointed out, and I have no doubt in my mind that there was evidence on both sides before the jury. That being so, and the verdict not being manifestly unjust, I think the motion should be refused, with costs to be set off against the costs of the last case.

CHUBB, J.: I agree. I have nothing to add.

REAL, J.: I concur.

Motion dismissed with costs, to be set off against the costs of the last motion.

Solicitors for Appellant: *Macdonald-Paterson & Hawthorne.*

Solicitors for Respondents: *Macpherson & Feez.*

ECCLESIASTICAL JURISDICTION.

HARDING, J. 4th October, 1893.

TRICKEY *v.* MAYNARD.

Administration action—Further consideration—Certificate of Registrar — Application for payment into Court—Practice—Costs.

An application for payment into Court of a sum of money found to be due on the certificate of the Registrar in an administration action should be made by summons in Chambers.

MOTION for an order that the defendant, as trustee and executor of the will of James Trickey, deceased, should pay into Court, on or before the 11th instant, the sum of £1,112 0s. 11d., the amount certified by the Registrar to be due from him in respect of the real and personal estate of the said testator. The motion was made under C.O. XXI, r. 10 (*Harding's A. & O.*, 611).

Gore-Jones, for the plaintiff. Defendant, in person.

HARDING, J.: According to *Daniell's Chancery Practice* (1865), pages 16 and 19, when a matter is referred for further consideration, as is the case here, all that it is necessary to do is to have everything in readiness to wind up the estate.

Gore-Jones: We are following the practice adopted in *Anderson* v. *Anderson*, *Courier* Reports, October 22nd, 1892, which is the latest record.

HARDING, J.: You should not go by the records. We have Acts and Orders to go by, and it is not the practice of the Court to endeavour to save parties the costs inflicted upon them by the ignorance of their lawyers. If, however, the defendant consents, I can do anything you like; but if he is here to oppose, you must go right. I wish there was a regulation that nobody should be allowed to look at the papers in the office. There is a practice in *The Acts and Orders* for nearly every conceivable thing which has to be done; and *Daniell's Chancery Practice*, except so far as the pleading before trial is concerned, is as nearly correct as possible to the practice in Queensland. I do not think the matter has been brought on as cheaply as possible, but there is no doubt the Court has power to act. In order to put it right, however, the costs, if the order is granted, will be cut down to what they would be if the application was made in Chambers. If the application is opposed, and I am induced to decide against it, I shall know when the matter comes on again that the defendant has been the cause of a large amount of money being thrown away unnecessarily, and probably costs will not then be given him. If the money is on the Registrar's certificate I shall be inclined to give the defendant a longer time in which to pay the money, if he desires it.

The defendant stated he did not know till he came into Court the sum of money demanded of him. He was represented by his solicitor at the hearing. The plaintiff is co-executrix, and should be liable for half the amount. The money never came into his possession.

HARDING, J.: It is found you have a certain sum in your possession belonging to the estate, and you are called upon to give it up. I make the order as prayed, but it is not to be enforced until November 4th, unless it is shown that the defendant intends to leave; the defendant must pay the costs, such costs not to exceed those which would have been incurred if the application had been made in Chambers on a summons. This case is not to be cited as a precedent for making a similar application.

Solicitor: *H. E. Smith.*

GRIFFITH, C.J. 9th and 11th October, 1893.

In re SHEPPERD, DECEASED.

Probate—Test of testamentary Document—Intention of testator—Extrinsic evidence—Practice.

An agreement between a father and his son, which was not to take effect till the death of the former, whereby the father gave the son property on certain conditions and subject to certain annuities, was admitted to probate, extrinsic evidence being produced that the father intended the document for his last will.

A document, whatever may be its form, may be admitted to probate if there is proof either in the document itself, or from clear extrinsic evidence, that it was the intention of the testator who executed it to convey by the instrument the benefits which would be conveyed by it if considered as a will, and that death was the event that was to give effect to it, but the instrument must be revocable.

Extrinsic evidence is admissible to shew whether a document is to take immediate effect or not.

Applications for probate or administration referred to the Court by the Registrar, should be made to the Court on motion, and should not be set down on the Court paper.

APPLICATION for letters of administration, with the will annexed, referred to the Judge in Chambers by the Registrar, who refused the grant on the ground that the document produced was not a will. The document was an agreement duly signed by John Shepperd, late of Drayton, near Toowoomba, farmer, and his son John Shepperd, junior (the applicant herein), and witnessed by three persons. By the agreement the deceased agreed to give the applicant the farm at Drayton, and selection 241 at Mount Clarendon, together with all the implements thereon, but the agreement and delivery were not to take effect during the lifetime of the deceased. It was to come into force on the death of the father, subject to certain conditions making provision for the widow and her daughter.

An affidavit was filed stating that the deceased always regarded the agreement made with his son as his last will and testament.

GRIFFITH, C.J., directed the application to be made in Court. It was inserted in the Court paper and called on, when his Honour intimated that he thought applications in the nature of probate should not be so set down. The old practice was to make them by motion, and he proposed to follow that practice. Any counsel having a motion for probate would be heard when motions were called.

Connolly, in support of the application, cited 1 *Williams' Executors*, 107; *Jarman's Wills*, 5th Edit., p. 19; *Green* v *Proude*, 3 Keble, 310; *in re Morgan*, L.R., 1 P. & D., 214; *Milnes* v. *Foden*, 15 P.D., 105. The tests as to whether a document is testamentary are—(1) Is it revocable? (2) Is the death the event on which it is to take effect? (3) If construed as a will, was it the intention of the testator to convey the benefits thereby? All these tests should be answered in the affirmative in the present case.

GRIFFITH, C.J., delivered judgment as follows: The document propounded as a will is not in testamentary form, but is in form an agreement between the deceased and his son, the present applicant. It begins with the words, "Memorandum of agreement between John Shepperd" (the deceased) "of the one part, and John Shepperd, junior" (the applicant), "of the other part, whereby the said John Shepperd agrees to give to his said son John (on the conditions and payments mentioned hereinafter to be made by the said John Shepperd, jun.) the farm," &c.. After describing the property intended to be disposed of it proceeds: "The above agreement and delivery of said property not to take effect during the lifetime of the said John Shepperd; but immediately on the decease of the said John Shepperd the whole of the property shall revert to the said John Shepperd, jun., and shall be considered in his possession, subject, however, to the payments and provisions for residence of his mother and sister hereinafter mentioned. Said John Shepperd, jun., on his part agrees to accept the above property as his full and fair share of his father's property, and agrees to make the payments hereinafter mentioned as arranged by his said father." Then follow particulars of annuities to be paid to the wife and daughter of the deceased by the applicant, and directions that in certain specified events they are to receive certain furniture and money. There is no stipulation that the annuities are to be paid out

of the property given to the applicant, but the agreement on his part is unconditional, except so far as a condition is implied in the preceding gift of the property. The document was executed by both parties, in the presence of three witnesses, on April 2nd, 1878. The testator died in 1883. The question now to be determined is whether this document is entitled to be admitted to probate as a testamentary instrument. The principle appears to be that if there is proof either in a document itself or from clear extrinsic evidence, first, that it was the intention of the person who executed it to convey by the instrument the benefits which would be conveyed by it if considered as a will, and, secondly, that death was the event that was to give effect to it, then, whatever may be its form, it may be admitted to probate as testamentary. *Cock* v. *Cooke*, L R., 1 P. & D., 241; *Milnes* v. *Foden*, 15 P.D., 105. In saying that death is the event that is to give effect to the instrument, it is to be understood that the instrument does not become binding until after death, and not merely that the performance of the obligations or enjoyment of the benefits imposed or conferred by it is postponed until after death. In other words, the instrument must be revocable. Whenever a question arises as to the testamentary character of a paper, an invariable test to be applied is whether the paper is revocable. *In the Goods of Robinson*, L.R., 1 P. & D., 384 Applying these rules to the present case, it is clear that the testator intended to convey by the instrument in question the benefits that would be conveyed by it if considered as a will. It is also clear that those benefits were not to be enjoyed until after his death, for the document expressly says so. It remains, then, only to consider whether the instrument came into operation as a binding agreement between the parties to it immediately upon execution, or whether it was signed without any intention of making a present contract, but only as an instrument to come into operation on the testator's death. I think that the instrument is upon its face open to either construction. If it was a present contract imposing obligations on either party it would not be revocable, and could not therefore be regarded as testamentary. On the question whether an instrument in the form of an agreement is intended to have immediate effect or not, extrinsic evidence is admissible both at common law (*Pym* v. *Campbell*, 25 L.J., Q.B. 277) and according to the rules recognised in the ecclesiastical courts for determining whether an ambiguous instrument is testamentary or not. *Cock* v. *Cooke*, *ubi sup.*; *Robertson* v. *Smith*, L.R., 2 P. & D., 43; *In the Goods of Slinn*, 15 P.D., 156. In the present case there is evidence that Shepperd often, and up to shortly before his death, referred to the document in question as his will. I am satisfied from this evidence, taken in conjunction with the ambiguous language of the instrument itself, that it was not intended to be a presently binding contract the performance of which was to begin on Shepperd's death, but that it was intended to have no binding effect at all until that event, and was therefore revocable. For these reasons I am of opinion that the instrument was testamentary in its nature, and is entitled to be admitted to probate. The delay in making application is satisfactorily accounted for. The applicant applies for administration as sole devisee and legatee. It appears from the instrument that he is a son of the testator, but there is no affidavit to that effect, nor any evidence to show that the property mentioned in the instrument was all or the greater part of the testator's property. The motion must therefore stand over for the purpose of supplying evidence to show that the applicant is the person entitled to the grant. This evidence may be adduced before the Registrar.

Solicitor: *F. G. Hamilton.*

TOWNSVILLE CIVIL SITTINGS.

CHUBB, J. October 10th, 12th, and 14th, 1893.

UNION BANK OF AUSTRALIA *v.* RAINE.

Action at common law—Debt on guarantee—Fraud —Costs as between solicitor and client.

Costs as between solicitor and client will not be allowed by the Supreme Court in an action at common law.

ACTION tried before Chubb, J., and a jury. The

plaintiff's claim was for money due on a guarantee. The defendant pleaded *(inter alia)* that he was induced to sign the guarantee by the false and fraudulent misrepresentation of the plaintiff's manager that the instrument was a transfer of shares only.

The jury found for the plaintiff on all the issues, and judgment was entered accordingly.

Macnaughton, for the plaintiff, applied for costs as between solicitor and client, and submitted that the Court has a general discretionary power to award costs as between solicitor and client in matters in equitable jurisdiction. The books show that to have been frequently done. *Andrews* v. *Barnes*, 39 Ch. D., 133. In that case the Court of Appeal expressly left the point open as regards actions at common law. By *The Judicature Act*, subsection 11 of section 5, the rules of equity are to prevail. This is a proper case for the exercise of the power, as the defence of fraud here was utterly unfounded. There was not a shred of evidence to support the defence.

Jameson, for the defendant, opposed.

CHUBB, J.: I had occasion last year to look into the law on this question, and the examination of the authorities then failed to satisfy me that I had the power in a common law action to award costs as between solicitor and client. That such powers exists in matters of equitable jurisdiction there is no doubt whatever. It is, however, only exercised in apparently three classes of cases which I need not here mention. In *Mordue* v. *Palmer*, L.R. 6, Ch. 22; *Mellish*, L.J., at p. 32, says: "The Common Law Courts have no power to give costs between solicitor and client . . . . But it is otherwise in Courts of Equity." In *Andrews* v. *Barnes*, the Court of Appeal declined to express an opinion on the question as regards matters in common law jurisdiction. It may be that there is such power, and I would be inclined to make the order. so that the question might be settled by the Full Court, but the plaintiff's counsel will not accept the risk of an appeal. I am not aware of any case since *The Judicature Act*—there can be none before in the nature of things—where the High Court exercising common law jurisdiction has awarded such costs. I certainly think there should be such power, for this is a case in which I would have unhesitatingly used it. The conduct of the defendant in setting up such a defence, and —without a particle of evidence to support it—persisting in it up to the very last moment, certainly merited the imposition of solicitor and client costs. As it is I am compelled to refuse the application. The plaintiff will of course get the usual party and party costs under the rule providing for costs following the event.

Solicitors for plaintiffs: ***Daly & Beaumont***, agents for ***Marsland & Marsland***, Charters Towers.

Solicitors for defendants: ***Dwyer***.

CIVIL COURT.

GRIFFITH, C.J. October 19th, 1893.

PURCELL *v.* MESTON.

Practice—District Courts Act s. 130—Security—Power to vary previous Order in an action—Abridgment of notice of trial—O LVI, r. 6.

In an action for malicious prosecution an order was made by Griffith, C.J., that the plaintiff should find security before a certain date, or in default that the action should be remitted to the District Court. At the trial at the District Court an objection was raised by the defendant that, as the original writ had not been filed with the Registrar as required by s. 130 of *The District Courts Act*, the Court had no jurisdiction. Paul, D.C.J., ordered the action to be struck out. A summons was then taken out to vary the order of the Chief Justice, and to abridge the time for notice of trial to allow the action to be tried at the Civil Sittings of the Supreme Court.

The original writ had been mislaid by the defendant's solicitor.

Griffith, C.J., stayed the proceedings under the former order, and abridged the time for notice of trial for the Civil Sittings of the Supreme Court, and refused to order the plaintiff to give security.

THIS was an action for malicious prosecution. On a summons for security for costs, which, by consent, was treated as a summons under section 130 of *The District Courts Act of 1891*, an order was made by the Chief Justice on the 18th September, 1893, ordering that the plaintiff should give security for £100 before 3rd October, 1893,

and that in default the action should be remitted to the District Court at Brisbane.

The order as drawn up by the defendant directed the action to be remitted to the District Court at Brisbane, for trial at the October Sittings of that Court.

At those Sittings both parties appeared, and objection was taken by the defendant that the original writ and order had not been lodged with the Registrar as required by section 130 of *The District Courts Act*.

It appeared that the original writ had been left with the defendant's solicitor, who accepted service and omitted to return the original to plaintiff's solicitor. The writ was not produced in the District Court.

PAUL, J., held that in the absence of the original writ he had no jurisdiction, ordered the action to be struck out, costs to be costs in the cause if the action was brought on again, otherwise the plaintiff to pay the costs of the defendant.

A summons was now taken out calling on the defendant's solicitors to show cause why they should not produce the original writ, and why the action should not be set down for hearing at the Civil Sittings of the Supreme Court commencing on Monday, 23rd. It appears from the affidavits filed by the parties that the original writ had been mislaid in the office of the defendant's solicitors, and could not be found.

Lukin, for plaintiff, submitted that the difficulty had been caused entirely by the default of the defendant's solicitors, and asked that the order of 18th September might be varied and the time for notice of trial abridged so as to allow the action to be tried at the ensuing Civil Sittings of the Supreme Court. A judge has authority to vary an order previously made by him in an action, if justice could not otherwise be done. *Welply* v. *Buhl*, 3 Q.B.D., 253.

GRIFFITH, C J., suggested that as the difficulty had arisen from an accidental error of defendant's solicitors, the defendant might gracefully assist in getting over the difficulty.

Boone, for the defendant, offered to consent to the order of 18th September being varied and the action being tried as proposed by plaintiff, provided that the plaintiff gave security for costs. He further submitted that without the consent of the parties a judge had no power to vary a previous order. He asked for security for costs.

GRIFFITH, C.J., after reviewing the facts of the case and referring to *Welply* v. *Buhl*, was of opinion that, whether a judge had or had not power to rescind or vary a previous order without the consent of the parties, he certainly had power to stay proceedings under a previous order in an action if justice could not otherwise be done. Here it had become impossible, owing to the default, however innocent, of the defendant's solicitors, to proceed on the order of the 18th September. The original writ not being capable of production, the action could not be remitted to the District Court. It remained in the Supreme Court, where it must be tried, unless the plaintiff were to be deprived of the redress he claimed. He thought he had power, under O. LVI, r. 6, to abridge the time prescribed for notice of trial, and under the circumstances, as the parties had already come to the District Court prepared for trial, and as the case would not probably come on until after the expiration of the full time allowed by the rules, he thought it a proper case in which to do so. He therefore stayed all proceedings under the order of 18th September, and made an order abridging the time for notice of trial, so that it might be given on October 20th for trial at the Civil Sittings of the Supreme Court, beginning on Monday, 23rd. He refused to order the plaintiff to give security for costs, expressing his opinion that such an order would, under the circumstances and in that stage of the proceedings, amount to a denial of justice.

No costs of the application were allowed to either party.

Solicitor for plaintiff: *Winter*.

Solicitors for defendant: *H. B. Lilley & Cowlishaw*.

BRISBANE CIVIL SITTINGS.

REAL, J. 23rd and 24th October, 1893.

DUNNE *v.* HENNESSEY.

Probate in solemn form—Cross-examination of witnesses—O. XXII, r. 11—Costs.

In an action for probate in solemn form of a will, the next of kin of the testatrix gave notice that they only intended to cross-examine the witnesses produced in support of the will. The trial lasted two days. The jury found the will duly executed.

Held, that on the evidence there was sufficient ground for the defendants to call upon the plaintiffs to prove the will in solemn form, but that after the first day the defendants had gone on at their own risk, and they were allowed their costs out of the estate, not including their own and the plaintiff's costs of the second day.

ACTION by the executors of the will of Bridget Fraley, or Frawley, for probate in solemn form. The defendants gave notice in accordance with O. XXII, r. 11, that they only intended to cross-examine the witnesses as to execution.

Byrnes, A. G., and *Wilson*, for the plaintiffs.

Power, and *Groom*, for the defendants.

Evidence was given by the witnesses to the will and clerks in the solicitor's office. The taking of the evidence occupied more than one day. Counsel addressed the jury, who found for the plaintiffs in favour of the will.

Power asked for costs out of the estate, and contended there was sufficient evidence to justify proof of the will in solemn form. If the trial had been unduly protracted that was due to the plaintiffs. The opposition was not wanton as in *Foley* v. *Brogan*, 11, L.R Ir., 421.

Wilson: Costs should follow the event. In any case the defendants should not get the costs of the second day. The defendants had no reason to expect anything from the testatrix.

REAL, J.: That is not the question. It is not whether the relatives were disappointed, but whether they had reason to suppose that was the will of the testatrix; whether it indicated such a sudden change of mind as to lead them to think that it did not express her wishes. In this case it appears to me that on the evidence there was sufficient ground for the defendants to call upon the plaintiffs to prove the will in solemn form. That I think chiefly arises from the evidence of Pearsen, and also from Mrs. Lambert's recollection of the manner in which the will was executed; because, if she is correct, it is possible that such carelessness was exercised in the preparation of the will that it was not properly executed. Still after the evidence of Mrs. Corrigan and Mrs. Lambert, the defendants might have intimated they were satisfied. Up to that extent they were within their rights, but if they went beyond they were no longer entitled to the protection which the Court gave to next of kin, or the person who in ordinary course would be entitled to the property. If we were to go beyond that it would be encouraging litigation. While I do not believe the present practitioners would take advantage of such a state of things, still the opportunity will always bring the class, and it is well therefore that the Court should hold its hand and say, "so far as it is necessary for the will to be proved we *will give* you protection, but if you go beyond that you must do it at your own risk and expense." It appears to me the whole thing has been contested to the end. I therefore order that the defendants should have their costs out of the estate, not including their own and the plaintiff's costs of to-day.

Solicitors for the plaintiffs: *Wilson, Newman-Wilson, & Hemming,*

Solicitors for defendants: *Pritchard.*

ECCLESIASTICAL JURISDICTION.

GRIFFITH, C.J. 3rd November, 1893.

Re REID.

Testamentary instrument — Deed — Irrevocable disposition.

B. by his will gave property to trustees upon trust for his widow for her life, and afterwards as she should by deed or will appoint. The widow married again and, in pursuance of such power of appointment, executed two instruments under seal in the presence of two witnesses. The instruments were prepared in Scotland, and had an attestation clause in the form ordinarily used in the case of English wills. One instrument directed the trustees, after the appointor's death, to

pay her husband £5000 "in implement of the obligation contained in an antenuptial contract," and the appointor reserved a power of revocation as to all the provisions of the instrument except the gift to her husband, which was to be irrevocable except with his consent. The second instrument, by which certain alterations were directed in the first instrument, contained no power of revocation. Both were indorsed "deed," but in the second instrument certain gifts were described as "legacies."

Held, that as the dispositions were not revocable, the instruments were not testamentary in character and were not entitled to be admitted to probate, but took effect as deeds of appointment.

APPLICATION for probate of a document, refused by the Registrar on the grounds that no executors were named in the document; that it contained no direction to pay debts; that it was doubtful whether it was a will, or a codicil, or either.

John Barker, by his last will, dated 28th August, 1876, appointed Robert Wilkins (now deceased), W. H. Gaden, and John Barker, son of his brother, executors, and directed his estate to be held in trust for his wife for her life, and afterwards as she should by will or deed appoint. The widow, on 26th July, 1886, directed and appointed W. H. Gaden and John Barker, as surviving trustees, three months after her death, or as soon after as practicable, to realise the estate and divide the proceeds into two equal parts. She directed one part to be paid to Francis Reid, of Dumfries, bank teller, whom she afterwards married. The gift to Reid was to be irrevocable, except with his consent. In the second instrument she altered the gifts to her other relatives.

Lilley, for W. H. Gaden, claiming to be executor according to the tenor, in support of the application.

GRIFFITH, C.J.: The question is whether the document is a testamentary instrument or a deed, the testatrix having power to appoint in either way.

Lilley, The document can be read either as a testamentary instrument or as a deed. If it is the former, to whom should probate be granted? *Platt* v. *Routh*, 6 M. & W., 756; *Milnes* v. *Foden*, 15 P.D., 105; *re the Goods of Slinn*, ib. 156; *Bell's Dictionary and Digest*, 1122-3; *Farwell on Powers*, 271. The instrument is in the form of a will; the word "legacies" is used; it is to operate after death. It was revocable except so far as concerned Reid. It might be considered a deed. *Whyte* v. *Pollok*, 7 Ap. Ca., 400. It was sealed. If it is a will the applicant should get probate as executor according to the tenor. He should be granted letters of administration with the will annexed. *Re the Goods of Fraser*, L.R. 2, P. & D., 183; *Re the Goods of Punchard*, ib., 369. If it was a will duty would be demanded before probate, and an order *nisi* prohibiting the Registrar from demanding duty was asked for

GRIFFITH, C.J.: The instruments sought to be admitted to probate in this case are two appointments, dated respectively 26th July, 1886, and 2nd December, 1889, and made by Mrs. Georgina Reid, in execution of a power of appointment contained in the will of John Barker, by which certain property was given to the trustees of his will upon trust for his widow (afterwards Mrs. Reid), for her life, and after her death for such purposes as she should by deed or will appoint. Both the instruments in question were prepared in Scotland by Scottish practitioners, and executed in that country. Both are in the first person, beginning "I, Mrs. Georgina Barker, &c."—They are under seal, each was executed in the presence of two witnesses, and has an attestation clause in the form ordinarily used for English wills, but not describing the instrument as a will. The first recites Barker's will, and directs and appoints the trustees of that will, as such trustees, to dispose of the trust estate after the appointor's death in manner directed by the instrument. They are directed to pay £5000 to Mr. Francis Reid "in implement of the obligation contained in an antenuptial contract" of even date, and to pay the rest of the trust property to other persons. The instrument is spoken of in the body of it as "this deed." The appointor reserves a power of revocation as to all the provisions of the instrument except the gift to her husband, which she declares to be irrevocable except with his consent. She then declares void all previous deeds executed by her

in regard to the disposal of the trust estate, dispenses with the delivery of the instrument as a deed, and consents to its registration for preservation.

By the second instrument, which is indorsed on the former, and in which she describes herself as the "granter of the foregoing deed of direction and appointment," she "in exercise of the power conferred on her" by Barker's will, directs and appoints the trustees of that will, in carrying out the wishes and instructions contained in "said deed," to do so "subject to the following alterations." She then cancels certain of the gifts contained in it, one of which she describes as "a legacy," one as "a sum," and one as "a sum or legacy," makes other gifts in lieu of them, and with these exceptions confirms it. This instrument contains no power of revocation, and no dispensation with delivery, but it contains a statement that it may be registered with the former one. Both instruments were executed in duplicate, and both are indorsed "deed of direction and appointment of Mrs. G. Barker."

The question for determination is whether these instruments are testamentary in their nature, and as such entitled to be admitted to probate. I had lately occasion, in *Re Shepperd* (*Supra*), to consider the rules for determining whether a document not in the ordinary form of a will should be considered as testamentary. The consideration that the instrument is not to take effect until after the death of the maker throws no light on the question in this case, as the appointment could not have any earlier operation. It will be observed that under Barker's will the appointment might be made either by deed or will—and both the instruments in question have some characteristics both of deeds and wills. The attestation clauses (which are such as are recommended by Scottish text writers to be used in the case of wills intended to operate on English property, although not required or usual in the case of Scottish wills) appear to indicate that the maker thought or was advised that she was making testamentary instruments, a circumstance which I think is of importance, notwithstanding Sir J. Hannen's observation to the contrary in *Milnes* v. *Foden*, 15 P.D., at p. 107 (see *Whyte* v. *Pollok*, 7 App. C., at p. 405), and the reference in the later instrument to gifts in the former as "legacies" tends in the same direction. On the other hand, part of the first instrument is expressly declared to be irrevocable—a declaration which, if it were a will, would be inoperative, *Vynior's Case*, 8 Co., 82a—while the latter, after revoking some of the gifts which had been declared to be revocable, makes fresh dispositions and reserves no further power of revocation, a circumstance which suggests that the maker thought that she was then making a final and irrevocable disposition under the power, as she was in fact doing if the instrument operated as a deed and not as a will. *Sugden on Powers*, 369. I think it is the duty of the Court in dealing with these instruments, as indeed with all writings, whether Acts of Parliament, By-laws of Corporations, deeds, wills, or aught else, so to construe them *ut res magis valeat quam pereat*, i.e., so that effect may be given to the intentions of the maker. If, therefore, these instruments cannot operate as deeds, I think that effect should, if possible, be given to them as testamentary instruments, and *vice versa*.

It may be that an instrument may, if executed in an appropriate manner, operate both as a revocable appointment by deed and as a will. The rules given in *Milnes* v. *Foden* for determining whether an instrument is to be held to be testamentary or not would, if read literally, seem to include a revocable deed of appointment to take effect after the testator's death. If, however, an instrument can only take effect as a will, probate is necessary to its efficacy. *Platt* v. *Routh*, 6 M.&W., 756. I must therefore decide the question. I have no assistance from any extrinsic evidence except the indorsements, to which, however, I do not attach much weight. First consider the reasons for regarding the instruments as deeds. They are under seal. The former one contains a disposition which is expressly declared to be irrevocable—a disposition which, if taken literally, is conclusive against the

view of its being a testamentary instrument; the second, which confirms the first, appears to have been delivered as a deed. I infer this from the fact that it does not, as did the first, contain any declaration dispensing with delivery, which by Scottish law appears to be equivalent to formal delivery, that it was executed in duplicate, and contains express authority to register it. Whether the dispensation with delivery would be accepted by the law of Queensland as a form of delivery, for the purpose of giving effect to a deed depending for its validity upon delivery, may be doubtful, but the confirmation contained in the later instrument renders it, I think, unnecessary to consider the question. In any event the question of delivery of the instrument appears to have been recognized by the maker as important, a question which does not arise in the case of a will. Moreover, wills do not need to be sealed under the Scottish law any more than under the law of Queensland. On the other hand there are some reasons for regarding the instruments as wills. These appear to be *mainly the* form of the attestation clauses and the reference in the later instrument to two of the gifts in the former as "legacies," both of which circumstances suggest, as I have already said, that the maker, or her adviser, thought that she was executing a testamentary instrument. I have to weigh these conflicting arguments.

In order to hold the instruments to be testamentary I must be satisfied that they were revocable. To do this I must reject altogether the express declaration in the first instrument that one of the dispositions is to be irrevocable except by consent of the person in whose favour it is made. This, however, would not be conclusive if the arguments showing that the instrument was intended to be testamentary clearly preponderated. I must also disregard the circumstance that in the second instrument the idea of any future power of revocation seems to have been given up. I must hold the power of revocation in the first instrument to be surplusage, as well as the declaration as to delivery and the fact that both are under seal. If, on the other hand, I hold that they are not testamentary, it follows that the use of the term "legacy" in the second instrument was erroneous, and that the execution and attestation of both instruments in the manner required by English law in the case of wills was an unnecessary and idle ceremony. But, after all, the use of the term "legacy" to describe a gift to take effect after the death of the giver, is a not unnatural error, and the mode of execution and attestation may perhaps be explained as arising from abundant caution on the part of practictioners not familiar with the English law relating to the execution of powers. On the whole I think that I ought to adopt this explanation rather than do violence to the language of the instruments by rejecting words which were apparently introduced with a full sense of their meaning, and holding other words apparently introduced with equal deliberation to be surplusage. I am therefore of opinion that the dispositions made by the instruments were not revocable, and that the instruments are consequently not testamentary in character, but take effect as deeds of appointment. It follows that they are not entitled to be admitted to probate. Mr. Lilley, to whose argument I am much indebted, asked me to allow the applicant, who is one of the trustees under Barker's will, and who I think was quite right in submitting the matter to the Court, his costs out of the estate. But even if I have power, exercising this jurisdiction of the Court, to give the costs of an unsuccessful application for probate out of the estate, which I much doubt, I think that there is no estate under my control out of which I could give them. *Adamson* v. *Hammonds*, L.R. 3, P. & O., 141. The motion is rejected.

Solicitors: *Rüthning & Jensen.*

IN INSOLVENCY.

GRIFFITH, C.J.: 3rd November, 1893.

In re RANSOME, AN INSOLVENT.

Insolvency Act of 1874, s.s. 14, 168—Certificate of Discharge—Review—Judicial Discretion.

The Court has power under sec. 14 of *The Insolvency Act* to review a refusal of a certificate of discharge, and has a discretion under sec. 168 to grant a certificate already refused under that section, and in exercising that discretion regard should be had to all the circumstances of the case, including the period during which the insolvent has been under disability.

The circumstances under which an application for a certificate of discharge may be made under the different sections, and the cases in which the Court should exercise a discretion, discussed and explained.

In re Tobias (1891), 1 Q.B., 463, followed.

APPLICATION for a certificate of discharge under sec. 168 (subsec. 2) of *The Insolvency Act of 1874.*

An application by the insolvent had been refused by Lilley, C.J., in 1888 (3 Q L.J., 101). The facts appear fully in that report and the present judgment.

Pritchard for the insolvent.

GRIFFITH, C.J.: The adjudication was made in this case on 17th December, 1884. The assets realised less than £20. Debts were proved by three creditors amounting in all to £304, of which £222 represented the taxed costs of an unsuccessful action brought by the insolvent against the creditor;—of the other two creditors one was in respect of a debt of less than £10. In 1888 the insolvent applied to my learned predecessor for a certificate under section 167 (subsec. 1) of *The Insolvency Act*, on the ground that the insolvency had arisen from circumstances for which he could not justly be held responsible. I am informed by the Registrar that this application was directed to stand over, with leave to renew it under another section. On 25th July, 1888, Lilley, C.J., delivered judgment, refusing the certificate. The judgment is reported (3 Q.L.J., 101). The application was treated as made under section 168 (subsec. 2). On 7th June last the insolvent applied to me for a certificate under section 167 (subsec. 1), but on discovering, by reference to the papers, that the previous application had been formally made under the same section, I advised the withdrawal of the application and a fresh application under section 168 (subsec. 2). As, however, it appears that the application already refused by Lilley, C.J., was treated by him as made under that section, I can only deal with the present application as an application to review that decision, which I have power to do under section 14 of the Act The refusal was mainly based on the grounds that the insolvent had not kept proper books of account, by which the trustee might have discovered the course of his business, and that a sum of money had been disposed of by him on the eve of insolvency which was not satisfactorily accounted for. The learned Chief Justice does not seem to have doubted that the cause of the insolvency was the unsuccessful litigation on which the insolvent entered, and he observed that he would not be disposed to press the fact of this unsuccessful litigation very hardly against him. In this I quite concur. I believe that the insolvent honestly believed that he had a good claim, which he endeavoured to enforce by the action. I may observe in passing, for his benefit, that the claim appears to me to have been a mistaken one, based upon the notion that the price that can be obtained for a specific article in the market depends upon the mode of calculating that price, instead of depending upon the amount which a purchaser is willing to give for the article. It should be plain enough that if a purchaser is only willing to give £100 for an article, it makes no difference to him or to the vendor whether the article is estimated as containing 200 feet and sold at 10s. a foot, or estimated as containing 100 feet and sold at £1 a foot. The action failed, however, on another ground,—the want of evidence to establish an alleged usage of trade. Under these circumstances, if the case now came up for the first time for decision, I should be disposed to hold that if the fact of the unsuccessful action stood alone the certificate might properly be granted under section 168 (subsec. 2). The words of that section differ materially from those

of section 167. Section 167 contains negative words providing that a certificate shall not be granted unless it is proved to the Court, either by substantive evidence or by a special resolution of the creditors, that the insolvency has arisen from circumstances for which the insolvent cannot justly be held responsible, or unless the assets are equal to the proved debts. But, even if these conditions exist, the Court may suspend or withhold the certificate if it appears that the insolvent has made default in giving up his property, or that a prosecution has been commenced against him for any offence under the Act Under this section the Court can only act where the prescribed conditions exist, and the application cannot be made until the insolvent has passed his last examination, except with the consent of his creditors properly testified. It appears to have been contemplated that debtors who could establish affirmatively that they could not justly be held responsible for their insolvency would apply for a certificate, and so relieve themselves from the very serious civil disabilities which are incident to the status of insolvency, as early as possible. Section 168 deals with the case of insolvents who are unable to bring themselves within the provisions of section 167, and advantage may be taken of its provisions notwithstanding a previous unsuccessful application under that section. Under this section the insolvent must wait for twelve months at least from his adjudication, and, unless he can obtain the assent of a majority in number of his creditors, must wait for two years. But, when the prescribed period has elapsed, he may apply to the Court, and the Court "may grant the certificate." The negative words of section 167 are not repeated, but instead of them *is* a provision that the insolvent must clear himself on oath of any failure to surrender his property, and, if the application is based on consent by creditors, of having obtained that consent by collusion. The discretion to withhold or suspend the certificate is absolute, instead of being limited as in section 167. I think that the difference of language between the two sections indicates an intention that in dealing with an application under section 168 the Court should exercise a wide, and indeed complete, discretion, such as is not given by section 167, and that in the judicial exercise of this discretion regard is to be had to all the circumstances of the case, including the period during which the insolvent has been under disability. The Act assumes that he is unable to establish that the insolvency arose from circumstances for which, strictly speaking, he cannot justly be held responsible, but that nevertheless it may be proper to grant him a certificate of discharge. This view is confirmed by the language of section 169, which withholds all discretion from the Court if certain facts are established, and requires the Court—an unusual form of provision—to grant the certificate (*re Simonsen*, 4 Q.L.J., 22). There are thus three classes of cases—cases in which the Court can only act upon the merits being affirmatively proved to its satisfaction (section 167), cases in which the Court has no discretion (section 169), and cases in which the Court has a discretion not fettered by any prescribed conditions (section 168). On what grounds, then, should the wide judicial discretion conferred by section 168 be exercised in favour of an insolvent? Without attempting to define the conditions under which it should be so exercised, I think that a principal consideration should be the nature and the gravity or triviality of the delinquencies which disentitle him to a certificate under section 167, and that if the objections to the grant of a certificate under that section are such that they might fittingly be visited with a suspension of the certificate, or even by punishment under the penal clauses of the Act (if they amounted to an offence), the Court may, after a sufficient time, exercise its discretion in favour of the insolvent. I am not satisfied in the present case with the explanation which the insolvent gives of the mutilation of his ledger, or of his explanation as to the transfer of money to a so-called trust account. But, even if the unexplained transactions had amounted to offences under *The Insolvency Act*, for which he might be penally

visited, I do not think that the punishment of perpetual civil disability ought to be imposed upon him for them. In the case of *re Tobias* (64 L.T.N.S., 115) it was said by the Court (Cave and Williams, JJ.) that the refusal of a discharge is the very order above all others which may be considered by way of review after the lapse of time, under the power of review to which I have already referred, and that this power ought not to be restrained by considering it in any niggardly spirit. In the same case the Court intimated that the position of a bankrupt whose discharge has been rightly refused on a first application ought not to be considered as an utterly hopeless one, so that, however exemplary his behaviour, he must be compelled to go through the remainder of his life an undischarged bankrupt. And the Court in that case thought that a suspension of a discharge for nearly seven years was a sufficient punishment. In the present case I have no evidence of the insolvent's conduct or dealings since adjudication, but he has been an undischarged insolvent for nearly nine years. And, even if all the possible inferences from his unexplained transactions, to which I have referred, are taken most strongly against him, I think that his punishment is sufficient. I do not in any way dissent from the judgment of my learned predecessor as a judgment pronounced at that time, but I deal with the case on the footing of the lapse of five years since that judgment was pronounced. The trustee, who is the principal creditor, neither opposes nor acquiesces in the grant of a certificate.

Under all the circumstances, and using the power of review which I have, I think that I ought, in the exercise of the discretion conferred by section 168, to grant the certificate.

This conclusion is quite in accord with the decision of Harding, J., *in re Perkins* (1 Q.L.J., 90), who authorizes me to say that he adheres to his opinion as then expressed. I have also had the opportunity of conferring with my brother Real, who authorizes me to say that he concurs generally in this judgment. The certificate is granted.

OCTOBER SITTINGS OF NORTHERN FULL COURT.

SMITH *v.* O'BYRNE. *Ex parte* O'BYRNE.

Assault—Schoolmaster—Punishment of pupil—Excessive violence.

A schoolmaster may punish for school offences, but if he exceeds the bounds of moderation, either in the manner, instrument, or quantity of the punishment, he is answerable for the excess.

The authority and position of a schoolmaster explained.

MOTION calling upon E. J. Hennessy, John T. H. Bowden, and G. Massey, of Thursday Island, to shew cause why a conviction or order made against Mary O'Byrne for a common assault upon one Stella Anne Smyth, whereby the said Mary O'Byrne was fined one penny, should not be quashed, on the ground that there was no evidence of excess either in the manner, instrument, or quantity of punishment inflicted, and why the said Mary O'Byrne should not recover the costs of the application.

The facts appear in the judgment of Chubb, *J.*

Macnaughton, for the appellant, moved *the rule* absolute. The punishment was not excessive. *Archbold's Criminal Practice*, 723. The Court will review the finding of the justices. *Neighbour* v. *Moore*, 4 Q.L.J., 145.

Jameson, for the justices, asked to be heard on the question of costs, as the magistrates had been brought into Court.

COOPER, J.: You cannot have costs. My opinion is now, as it was when I granted the rule *nisi*, that there was absolutely no evidence before the magistrates that there was excess in the force of the application of the instrument, or that an improper instrument had been used in the punishment of the child. That being so, the rule must be made absolute, with costs against the respondent and not against the magistrates.

CHUBB, J.: As this is a matter of some importance, I have taken the opportunity since the papers have been in my possession to look into the authorities, and it may be useful to schoolmasters and others to know the law on such matters. A schoolmaster may, in respect of

school offences, misbehaviour, disobedience, idleness, and the like, lawfully inflict moderate and reasonable corporal chastisement, commensurate with the offence, upon a scholar capable of appreciating the punishment. If, however, he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of the punishment, the excessive violence is unlawful, and he is answerable to the law for that excess. The authorities for this doctrine will be found in 1 *Hawk*, P.C., c. 60, s. 23; *Bac. Ab. (Assault and Battery)*; 1 *Hale*, P.C., 473, 474; 1 *East*, P.C., 406; *Com. Dig. Pleader* (3 M., 19); *Stephen's Crim. Dig.* (Art. 201); 1 *Russ Cr.*, 4th Ed., 751, 1026; *R.* v. *Miles*, 6 Jur., 243; *R.* v. *Hopley*, 2 F. & F., 202; *R.* v. *Griffin*, 11 Cox. C., C. 402; and *Fitzgerald* v. *Northcote*, 4 F. & F., 656. In *Year Book*, 7 Ed. IV, the position of the schoolmaster is put as that of temporary guardian. In *Year Book*, 21 Ed. IV, fo. 6, p. 12, there is a case of assault and battery by an apprentice against his master, in which appears a *quaere*—"if a schoolmaster can justify (*i.e.*, beating a scholar), for it is not prejudice to him if the scholar will not take learning." Whether this *quaere* is the observation of the judge or an addition of the reporter does not appear clearly. The remark seems foolish, and the reason trivial. In *R.* v. *Hopley*, 2 F. & F., 202, where a schoolmaster was indicted for the manslaughter of a scholar, a boy aged thirteen, by excessive beating with a thick stick, Cockburn, C.J., directed the jury as follows: "By the law of England a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him) may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition—that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate or excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life and limb, in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb issue, then the person inflicting it is answerable to the law." In a subsequent case, *Fitzgerald* v. *Northcote*, 4 F. & F., 656, the same learned judge says: "The authority of the schoolmaster is, while it exists, the same as that of the parent. A parent, when he places his child with a schoolmaster, delegates to him all his own authority, so far as it is necessary for the welfare of the child." In both these cases, it may be noticed in passing, the scholars were boarders; and in *R.* v. *Hopley* the master, before inflicting the punishment, had written to the boy's father proposing to give the boy a severe beating, and had received the father's assent thereto. In this case the appellant, the head mistress of the primary school at Thursday Island, punished, in open school, a girl day scholar, aged nine years, for continued neglect of home lessons, after previous warning and punishment. The punishment consisted of four strokes of a cane, described in the evidence as of about the thickness of a boy's little finger. Two of the strokes were on the right hand, one on the left, and the fourth on the left forearm, two inches above the wrist It is apparently this last stroke that is complained of—the *causa teterrima belli*. A medical expert, Dr. Salter, who saw the injury on the same day and shortly after it was inflicted, deposed that there was a slightly raised mark above the wrist, that he did not think the child would suffer from it, and that it was nothing serious, but that it might have led to a serious injury as regards muscular action, and that in his opinion (in which I quite agree) "on the wrist is not a fit place to cane a child." The evidence of the child and her juvenile brother was that she had her hand out perfectly still—leading to the inference that the blow on the wrist was intentional. If this were so, and the justices on reasonable evidence came to that opinion, and also to the opinion that there had been an excess of violence, then their finding on the facts ought not to be disturbed by this Court, and the conviction ought to be sustained. Then

was there any reasonable evidence of an unlawful battery? The act of correction was lawful in itself. It could only become unlawful by and in respect of an excess. To make it an offence punishable by the criminal law the battery must have been intentional as well as excessive. If, therefore, the stroke on the wrist was unintentional and happened by misadventure, or was caused by the child's own fault, then it was no battery. There is no necessity to cite authorities for this elementary proposition. Now the evidence of the appellant and three of the school children was that the stroke on the wrist was occasioned by the child swerving her hand as the cane descended. Looking at the whole of the evidence and to the fact that there was no evidence of anger or improper feeling shown by the appellant, or of cruelty either by use of an improper instrument for punishment or by the infliction of an excessive number of strokes, I, as a judge of fact, would have been prepared to accept the appellant's version of the affair as the true one, not only on the weight of evidence, but because I cannot bring myself to the belief that the appellant deliberately and cruelly struck intentionally at the child's wrist. The three justices, however, who heard the case have come to that conclusion, necessarily disbelieving the appellant's story, and declining to accept her explanation. Then, with regard to the injury itself, it was stated to be "nothing serious"—the child did not cease attending school in consequence—and that it was of the most trifling character is indicated by the fine of the penny inflicted by the justices. I may say, however, that I do not for a moment doubt that the justices came to that conclusion in perfect good faith. Now this Court will review the finding of justices, even upon the facts where it appears that they have, in our opinion, taken an unreasonable view of the evidence, and the interests of justice require it. *Neighbour* v. *Moore*, 4 Q.L.J., 145, p. 14, per Lilley, C.J. I have no hesitation in saying that I can myself see nothing to justify the infliction of even the nominal fine imposed on the appellant. In my opinion the correction was lawful;—it was moderate, reasonable, and inflicted with a proper instrument. There was no excess, as the blow on the wrist was, I think, a misadventure, and in any case was of no serious consequence. The justices should therefore, I think, have dismissed the complaint. The conviction therefore *must be* quashed, and the fine and costs paid by the appellant returned to her. Costs against the respondent. No costs against the magistrates.

Solicitors for appellants: *Roberts & Leu.*

Solicitor for magistrates: *T. G. Fraser*, Crown Solicitor.

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